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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

THIRD NATIONAL BANK IN NASHVILLE, NASHVILLE BANK AND TRUST COMPANY AND WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra,* pp. 24–54) is reported at 260 F. Supp. 869. Its findings of fact and conclusions of law (App. B, *infra,* pp. 55–123) are unreported.

JURISDICTION

This is an action under Section 4 of the Sherman Act, 15 U.S.C. 4, and Section 15 of the Clayton Act, 15 U.S.C. 25, to enjoin violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and Section 7 of the Clayton Act, 15 U.S.C. 18. The judgment of the district court (App. C, *infra,* p. 124) was entered on December

16, 1966. A notice of appeal to this Court was filed on February 10, 1967. The jurisdiction of this Court to review the judgment of the district court on direct appeal rests on Section 2 of the Expediting Act, 15 U.S.C. 29. *United States* v. *Continental Can Co.,* 378 U.S. 441; *United States* v. *duPont & Co.,* 353 U.S. 586.

STATUTES INVOLVED

The pertinent portions of the Clayton Act and of the Bank Merger Act of 1966 are printed in App. D, *infra,* pp. 125–126.

QUESTIONS PRESENTED

1. Whether, in an antitrust action challenging a bank merger, the court, in deciding whether the effect of the merger "may be substantially to lessen competition" within the meaning of the Bank Merger Act of 1966, should apply the standards that this Court has announced in interpreting the identical words as they appear in Section 7 of the Clayton Act.[1]

2. Whether, in such an action, the court should make an independent determination of the merger's legality, or merely review the banking agency's determination to ascertain whether it is supported by substantial evidence.

3. Whether the court may properly deem a bank merger's anticompetitive effects clearly outweighed in the public interest by its probable effect in meeting the convenience and needs of the community to be served, without first finding that there is no less anticompetitive means to achieve the same benefits.[2]

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[1] Solely in order to simplify the issues on appeal, we do not challenge the district court's dismissal of the Section 1, Sherman Act, charge in the complaint.

[2] As explained below, p. 21, n. 12, we reserve the right to

STATEMENT

1. THE PROCEEDINGS

On March 12, 1964, the Third National Bank in Nashville ("Third National") and the Nashville Bank and Trust Co. ("Nashville Bank") agreed to merge. On April 27, 1964, they applied to the Comptroller of the Currency for approval of the transaction, as required by the Bank Merger Act of 1960, 74 Stat. 129. Pursuant to the provisions of that Act,[3] the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Department of Justice submitted re-

argue additionally, if probable jurisdiction is noted, the question whether, apart from the matter of less anticompetitive alternatives, the acquired bank here was a "floundering" bank so as to bring it within the convenience and needs defense at all.

[3] The Bank Merger Act of 1960 provided in pertinent part: "In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this Act. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. In the interests of uniform standards, before acting on a merger, consolidation, acquisition of assets, or assumption of liabilities under this subsection, the agency (unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved) shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection * * *."

ports to the Comptroller of the Currency on the competitive factors involved in the proposed merger. The Federal Reserve Board concluded that the merger "would have clearly adverse effects on competition" because it "would eliminate direct competition which exists between participants and would increase significantly * * * already heavy concentration." The Federal Deposit Insurance Corporation concluded that "the effect of the proposed merger on competition would be unfavorable." The Department of Justice concluded that the merger "would have severe anticompetitive effects upon banking competition in Metropolitan Nashville and would significantly increase the marked tendency toward oligopoly existing in the area generally." Despite these reports, the Comptroller of the Currency approved the merger on August 4, 1964, in an opinion stating that the merger would not lessen competition and would "improve the charter bank's ability to service the convenience and needs of the Nashville public."

On August 10, 1964, the United States filed suit in a federal district court charging that the proposed merger might lessen competition substantially, in violation of Section 7 of the Clayton Act (15 U.S.C. 18), and that it constituted a restraint of trade, in violation of Section 1 of the Sherman Act (15 U.S.C. 1). On August 18, 1964, the district court denied the government's motion for a preliminary injunction to stay the merger's consummation. The two banks merged on the same day.

Before the case was tried, Congress passed the Bank Merger Act of 1966 (App. D, *infra*, pp. 125–126). Expressly applicable to cases (like the present one)

that were pending in court on the effective date of the Act (February 21, 1966), it provides in relevant part that a federal banking agency "shall not approve [a proposed bank merger] * * * whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." In any action under the antitrust laws to challenge such a transaction, "the standards applied by the court shall be identical with those that the banking agencies are directed to apply."

On February 28, 1966, the Comptroller of the Currency intervened as a party in the action (as the new Act also permits). He testified at the trial that he did not believe the merger would lead to a substantial lessening of competition and that "the convenience and needs of the community to be served as a result of this merger clearly outweigh any anticompetitive effect that the merger might have had." (Fdg. 301.)[4]

After trial, the court, on November 22, 1966, issued an opinion holding for the defendants (App. A, *infra*, pp. 24–54). The court subsequently entered findings and its judgment dismissing the complaint (App. B, *infra*, pp. 55–123; App. C, *infra*, p. 124).

[4] "Fdg." references are to the district court's findings of fact, printed in App. B, *infra*, pp. 55–123.

merce Union. Commerce Union was Nashville's third largest bank and accounted for about 21 percent of Metropolitan Nashville's banking business (Fdgs. 66, 120). Negotiations foundered, however, when Weaver demanded $460 per share and Commerce Union offered only $360 (Fdg. 120; Tr. 610–614). Weaver then negotiated the sale to Third National, which agreed to pay about $420 per share (Tr. 1612–1613, 1615). The merger was approved by the boards of directors of both banks shortly afterwards (Fdg. 123).

The merger made Third National the county's largest bank, increasing its share of total deposits from 33 percent to 39.0 percent and its share of total loans from 36.7 percent to 40.3 percent (Fdg. 66). The merger increased concentration among the county's three largest banks in deposits from 93.1 percent to 97.9 percent, and in loans from 93.6 percent to 97.8 percent (Fdg. 66).

3. THE DISTRICT COURT'S DECISION

In dismissing the government's complaint, the district court held that the Bank Merger Act of 1966 amended the Clayton Act not only by requiring the court in an antitrust suit involving a bank merger to balance against the merger's anticompetitive effects its beneficial consequences in meeting community convenience and needs, but also by changing the standard—enunciated by this court in *United States* v. *Philadelphia National Bank,* 374 U.S. 321—for determining whether a merger may lessen competition substantially. The court held that bank mergers are "to be assessed as to anticompetitive effects not alone on

the basis of the quantitative analyses of the * * * *Philadelphia* case * * *, but, in addition, by taking into account all material factors with respect to each institution in the setting of the relevant market * * *." (App. A, *infra,* p. 37; Fdg. 82.) It added that the criteria that this Court had used in *United States* v. *Columbia Steel Co.,* 334 U.S. 495, to determine whether a challenged merger restrained trade in violation of Section 1 of the Sherman Act,[5] criteria "relegated to a place of relative unimportance in the *Lexington* case [*United States* v. *First Nat. Bank & Trust Co. of Lexington,* 376 U.S. 665], are considered to have been restored to grace with respect to bank mergers by reason of the 1966 Amendment." (App. A, *infra,* p. 51.)

Applying this broad standard, the court held that the merger would not lessen competition substantially. The court did not believe it "unreasonable that [in such a relatively small banking market] there should be a concentration of approximately 93% of combined assets in three banking institutions" (App. A, *infra,* p. 50). Moreover, Nashville Bank had accounted for only about 5 percent of the market, and in the court's view this addition to Third National's share was "not sufficiently large to have a substantial effect upon competition." (Fdg. 188(b).) Remaining competition was strong, said the court, the motive

[5] Namely, "dollar volume * * * [,] percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market." 334 U.S. at 527.

for the merger was not predatory, the market was rapidly growing and showed no trend toward concentration, the remaining banks were well managed, Nashville Bank was stagnating at the time of merger and had critical problems, and the record belied any "actual or probable future of oligopolistic behavior." (App. A, *infra*, pp. 51–52.)

In addition to concluding that the merger did "not violate the antitrust standards of the 1966 Amendment" (App. A, *infra*, p. 53), the court held that any anticompetitive consequences were clearly outweighed by considerations of community convenience and needs. It indicated that the Comptroller's findings on this issue could not be disturbed "unless they are unsupported by substantial evidence" (App. A, *infra*, p. 32; Fdg. 302), and that in this case his findings were well supported (Fdg. 302). The court stated that Nashville Bank before the merger was "floundering," because it had serious management problems, its growth had leveled off, it did not use modern banking methods, its quarters were old, some of its loans were doubtful, and it had only one branch. The court found that the merger served the needs and convenience of the community by solving these problems; by increasing the legal lending limits of the resulting bank; by providing the customers of Nashville Bank with more bank offices, a correspondent banking system, and a fully automated operation; by assuring its employees higher salaries and a funded pension plan; and by providing Nashville Bank with a new building, membership in the Federal Reserve System, better research facilities, more capi-

tal, a small-business investment affiliate, an experienced credit department, and a more efficient auditing department (App. A, *infra,* pp. 53–54, 44–47; Fdgs. 196–197).

THE QUESTIONS ARE SUBSTANTIAL

Section 7 of the Clayton Act (App. D, *infra,* p. 125) forbids any acquisition the effect of which, "in any line of commerce in any section of the country, * * * may be substantially to lessen competition, or to tend to create a monopoly." The Bank Merger Act of 1966 (App. D, *infra,* pp. 125–126) creates a new defense for determining the legality of bank mergers challenged under the antitrust laws. A bank merger is now illegal if its effect "in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade," unless "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." In so deciding, the court shall take into consideration "the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served," and "shall review de novo the issues presented."

This Court construed the new Act for the first time in *United States* v. *First City National Bank of Houston* and *United States* v. *Provident National Bank,* Nos. 914 and 972, this Term, decided on March 27, 1967. It there resolved one of the issues in the present

case against the appellees, holding—contrary to the court below—that the proper role of the district court in an antitrust suit controlled by the new Act is to determine independently the legality of the challenged merger, not merely to ascertain whether the banking agency's decision approving the merger is supported by substantial evidence, free from procedural infirmity, and in accordance with correct general principles of law.

Were this the only—or a completely dispositive—issue raised by this appeal, we would urge that the Court reverse the judgment below summarily. We do not suggest that course because there are two additional issues in the present case which the *Houston* opinion does not definitively resolve.[6]

The first is whether the Bank Merger Act of 1966 changes the standard for measuring the competitive effects of a bank merger. The district court in this

[6] We note also that the district court's ruling on the question whether its function is to review the agency's findings or to determine the issues independently is not wholly free from ambiguity. There is language which suggests that the court may have thought as an original matter that in fact the merger was justified by considerations of community convenience and needs (see App. A, *infra*, pp. 53-54; Fdg. 302). Even so, the judgment below cannot, in our view, stand. First, if, as we believe, the court misappraised the competitive term in the equation established by the Bank Merger Act of 1966, its balancing of the competitive harms of the merger against its public benefits is fatally flawed and cannot be upheld. Second, the district court's ruling on convenience and needs is, we submit, in any event vitiated by the court's failure to consider the possibility that the public benefits conferred by the merger could have been achieved by less anticompetitive means, such as hiring new management (see pp. 21-23, *infra*).

case acknowledged that the government had made a strong showing that the effect of the challenged merger might be substantially to lessen competition within the sense of Section 7 of the Clayton Act (see App. A, *infra*, p. 40), but deemed this immaterial. The court's view was that, although the competitive standard of the new Act is drawn virtually verbatim from Section 7,[7] Congress intended that the government in a bank merger suit would have to adduce more evidence than in an ordinary Section 7 case to establish that the merger was substantially anticompetitive and hence *prima facie* illegal. We disagree. The new Act, we grant, changes the legal standard of Section 7 by allowing a defense of "convenience and needs"; but it does not, in our view, disturb the principles that this Court has elaborated in its Section 7 decisions for determining when the effect of a merger may be substantially to lessen competition.

We emphasize that the question whether the court below applied an erroneous standard in determining the competitive effects of the merger is inescapably presented here. However plain the court's error on the scope-of-inquiry issue, its decision dismissing the government's complaint must still be sustained if it correctly held that under proper standards the government failed to establish that the merger may substantially lessen competition—such a showing being

[7] As we explain *infra*, p. 15, n. 8, the omission of any reference to "line of commerce" in the new Act appears not to change the standard.

a threshold requirement of demonstrating illegality.

The second additional issue presented by this appeal is whether a bank merger may ever be justified by considerations of community convenience and needs in the absence of evidence that the desired benefits cannot be achieved by a less anticompetitive expedient than the challenged merger. This, too, is an issue independent of the weight to be accorded the agency's determination. Our submission is that, as a matter of law, neither court nor agency may deem a substantially anticompetitive bank merger justified without first determining the unavailability of alternatives that would not harm competition as severely.

Not only are these issues independent from those decided in the *Houston* case; as next we show in somewhat greater detail, they plainly merit plenary consideration by this Court.

1.a. In its decisions interpreting and applying Section 7 of the Clayton Act, this Court, in accordance with congressional intent, economic theory, and the manifest needs of practical antitrust enforcement, has elaborated simplified principles of legality which stress market percentages as normally the most important index to a merger's competitive effects. See *United States* v. *Pabst Brewing Co.,* 384 U.S. 546; *United States* v. *Von's Grocery Co.,* 384 U.S. 270; *United States* v. *Continental Can Co.,* 378 U.S. 441; *United States* v. *Aluminum Co. of America,* 377 U.S. 271; *United States* v. *Philadelphia National Bank,* 374 U.S. 321. A similar test has been applied to mergers challenged under Section 1 of the Sherman

Act. *United States* v. *First Nat. Bank & Trust Co. of Lexington,* 376 U.S. 665. There is no sound basis for the view that competition operates so differently in the banking industry that different standards are required to determine when a bank merger may substantially lessen competition. See *Philadelphia Bank, supra; Lexington Bank, supra;* Edwards, *The Banking Competition Controversy,* National Banking Review, Sept. 1965, p. 1. And while Congress in the new Bank Merger Act decided that the test of Section 7 should not be the exclusive standard for adjudicating the legality of a bank merger, there is no indication that it intended the threshold determination—whether the challenged merger is substantially anticompetitive—to be made on a basis different from that of the *Philadelphia Bank* and *Lexington Bank* decisions. The district court's view that in making the initial determination of the merger's anticompetitive impact the court is to return to the rejected test of *United States* v. *Columbia Steel Co.,* 334 U.S. 495 (see *Lexington Bank, supra,* 376 U.S. at 672; *Philadelphia Bank, supra,* 374 U.S. at 340, 342, n. 20), is thus unsupported.

An affirmative indication that Congress intended no deviation from the established principles of the Sherman and Clayton Acts in the determination whether a challenged bank merger has significant anticompetitive effects is the fact that the Bank Merger Act's competitive standard is drawn verbatim from those Acts.[8] This was not an inadvertence.

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[8] It is true that express reference in Section 7 of the Clayton Act to competitive effects "in any line of commerce" was omitted. Although Senator Robertson argued that this omis-

"This language was intentionally used so as clearly to indicate * * * that the antitrust standards which have been developed over the last 75 years on the basis of case law definition of these statutory provisions are intended to be incorporated in the application of the proposed Act." 112 Cong. Rec. (daily ed.) 2337 (remarks of Congressman Reuss, who drafted this part of the Act). See, also, 112 Cong. Rec. (daily ed.) 2334: "the competitive standard to be applied is clearly that of the Sherman and Clayton Acts" (remarks of Congressman Patman, Chairman of the House Committee that drafted the Act).[9] Our

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sion was designed to broaden the appropriate line of commerce in a bank merger case to include alternative sources of credit, such as insurance companies and savings and loan associations (112 Cong. Rec. (daily ed) 2541, 2549), there is no indication that this intent was shared by most Congressmen; nor is there any specific indication of how the omission could change the competitive standard. Since a line of commerce must be delineated in order to assess a merger's possible anticompetitive effects, it is difficult to see what difference such an omission could make here—or what difference it would make even were the words "in any line of commerce" deleted from Section 7 itself. This Court has found commercial banking to be an appropriate line of commerce not only in a case under Section 7 of the Clayton Act (see *United States* v. *Philadelphia National Bank*, 374 U.S. 321) but in one under Section 1 of the Sherman Act (see *United States* v. *First Nat. Bank & Trust Co. of Lexington*, 376 U.S. 665)—which contains no express reference to "line of commerce." In any event, this question need not be decided in the present case, for the court below found that here, as in *Philadelphia Bank*, commercial banking was the proper line of commerce (App. A, *infra*, pp. 40–41, n. 5).

[9] The House Report states that "the bill acknowledges that the general principle of the antitrust laws—that substantially anticompetitive mergers are prohibited—applies to banks, but

research has disclosed nothing in the legislative history to suggest that the competitive standard of the Bank Merger Act should be interpreted otherwise than in accordance with ordinary principles of antitrust law. A dilution of those principles would ill accord with the congressional intent to "make the competitive factor preeminent" in applying the Bank Merger Act. 112 Cong. Rec. (daily ed.) 2334 (remarks of Congressman Patman).[10]

We derive additional support for this view from the language of this Court's recent *Houston* decision. While the question of the proper interpretation of the competitive test under the new Act was not directly in issue, the Court did observe: "Section 7 of the Clayton Act condemns mergers where 'the effect of such acquisition may be substantially to lessen competition.' The Bank Merger Act of 1966 did not change that standard." Slip Opinion, p. 3. "What is apparent

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permits an exception" where anticompetitive effects are outweighed by considerations of convenience and needs. H. Rep. No. 1221, 89th Cong., 2d Sess., p. 3.

[10] See, also, *id.* at 2333 (remarks of Rep. Patman), 2335 (remarks of Congressman Widnall), 2340 (remarks of Congressman Moorhead), 2342 (remarks of Congressmen Weltner, Halpern and Brock), 2344 (remarks of Congressman Minish). Certainly the statute's provision that the courts "shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions" has no bearing upon the proper interpretation of the Act's competitive standard. The House Report makes clear that "financial and managerial resources" are to be "considered only as they throw light on the capacity of the existing and proposed institutions to serve the community"; these factors are to be "weighed against anticompetitive effects"—not used to decide whether a merger is *prima facie* illegal because anticompetitive. H. Rep. No. 1221, 89th Cong., 2d Sess., p. 4.

is that Congress intended that a defense or justification be available once it had been determined that a transaction would have anticompetitive effects, as judged by the standards normally applied in antitrust actions." *Id.*, p. 2; see, also, *id.*, pp. 7–8. This is more than dicta. The appellees had argued that the government was required to plead the Bank Merger Act of 1966 in complaints challenging bank mergers. This Court ruled (Slip Opinion, pp. 1–3) that it was not; that the government need only allege a violation of the antitrust laws. So ruling, the Court implicitly decided, we submit, that the standard for determining whether a bank merger may substantially lessen competition has not been changed by the new Act.

b. It is clear under the standards of *Philadelphia Bank* and *Lexington Bank* that the merger at bar may lessen competition substantially. The bank resulting from the merger controls (in terms of loans) approximately 40 percent of the relevant market—surely "an undue percentage share" (374 U.S. at 363). Moreover, the merger produced "a significant increase" in concentration (*ibid.*), raising the market share of the three largest banks (in terms of loans) from 94 to 98 percent. See *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 280. In these circumstances, the precept that where "concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great" (*Philadelphia Bank, supra*, 374 U.S. at 365, n. 42) applies with special force.

Nowhere in the record is there evidence "clearly showing that the merger is not likely to have * * * [the] anticompetitive effects" that these market-share figures presage (374 U.S. at 363). That all Nashville banks continued to grow after the merger is irrelevant—obviously banks can grow yet not compete vigorously (*id.* at 367, n. 43). That concentration is high in other banking markets does not indicate the desirability of concentration in Nashville. And that a trend toward mergers was not shown here is irrelevant; the critical question is whether the market is already highly concentrated, not how it got that way.

2. If, as we believe, the district court misjudged the anticompetitive effects of the present merger, its finding that, in any event, the merger's beneficial effects in serving the community's convenience and needs clearly outweighed any anticompetitive effects also cannot stand. The court could not weigh competitive effects against considerations of convenience and needs when it had decided to give no weight to the competitive side of the balance scale. This error alone is sufficient to require reversal. But we note that the district court, in applying the statutory balancing test, committed another serious error:[11] it deemed itself free to approve a merger that might lessen competition substantially without finding that a less anticompetitive course than the proposed merger would not produce the desired benefits to the community.

a. The 1966 Bank Merger Act reflects Congress' con-

[11] We need not elaborate on the court's further error—deeming the Comptroller's balancing judgment conclusive if supported by substantial evidence—in view of this Court's ruling in its *Houston* opinion. See pp. 11–12, *supra*.

cern with the problem of the "floundering bank"—a bank not yet insolvent or in imminent danger of failure, but, because of poor financial condition, unable to render adequate service to the community (see House Report, *supra,* p. 3). But the fact that a bank is "floundering" or stagnating cannot, we submit, be found to "clearly outweigh" the anticompetitive effects of a merger unless that merger is necessary to solve the bank's problems. Such a merger would be unnecessary if an asserted management problem that has led to bank stagnation could be resolved in some other, less anticompetitive way. If, for example, a purchaser "other than a competitive bank, were ready, willing, and able to acquire the bank with management problems * * * then the convenience and needs of the community could be met without any resulting anticompetitive effects. Certainly that would be preferable." 112 Cong. Rec. (daily ed.) 2338 (remarks of Congressman Reuss); cf. Hall and Phillips, *Bank Mergers and the Regulatory Agencies* (Federal Reserve Board 1964), pp. 53, 84.

An analogous principle has long been followed in cases where companies claim that a merger is permissible under the "failing company" doctrine. This Court has deemed availability of other purchasers whose acquisition of the company would not involve as serious anticompetitive consequences material in the application of the doctrine. *United States* v. *Diebold, Inc.,* 369 U.S. 654, 665; *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, 302. See, also, Hearings Pursuant to S. Res. 61 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Cong., 1st Sess., Pt. 1, p. 326;

Report of the Attorney General's National Committee To Study the Antitrust Laws (1955), p. 123.

b. Assuming with the district court that the acquired bank here, though a growing bank earning considerable profits, was beginning to "flounder" or "stagnate" because it had a management succession problem, it lacked branches, its salaries were low, it had no funded pension plan, its Federal Deposit Insurance Corporation rating had declined from "satisfactory" to "fair", and its operations were not computerized,[12] there is no proof that these problems required this merger for their solution. Although Nashville Bank's new owners (see Statement, *supra*, p. 6) might well have tried to solve the bank's management problems directly, they made no serious efforts in this direction. They did not look for new executives among other Nashville banks or elsewhere in Nashville; they made no attempt to use a management recruiting firm; and they approached only one potential candidate (Tr. 1597–1612). Such efforts as they did make[13] were perfunctory. No sooner did the Weaver

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[12] If probable jurisdiction is noted, we reserve the right to argue that the acquired bank in this case was not in fact floundering or stagnating within the contemplation of the Act, and (since the "convenience and needs" argument here was based upon the contention that the bank was floundering) that the defense of convenience and needs is therefore unavailable to the appellees even if there is no requirement of exploring less anticompetitive methods of meeting the convenience and needs of the community.

[13] Defendant's expert testified that the possibilities of finding an adequate replacement for the president of Nashville Bank were remote (Tr. 1636). This testimony, however, was based in large part upon the low salary that the bank offered for the post. It is difficult to see why, in light of its considerable profits, it could not have raised executive salaries.

group buy Nashville Bank than it began to investigate merger, and the bank was merged into Third National only eight weeks later. Since Nashville Bank was not failing—was indeed earning handsome profits—it cannot tenably be maintained that community "convenience and needs" required such haste.

The district court's finding that it would have been "practically impossible within any reasonable period of time to obtain adequate managerial replacements [for the retiring officers] * * * from * * * outside" the bank, primarily because "the bank could not be revitalized" without "the expenditure of large sums of money," is conclusory and unsupported by the evidence. Defendants' own witness testified that the bank could be revitalized for $575,000—that this sum would have covered increased salaries, a pension plan, remodeled offices, two branches, a business development department, an auditing department, a credit department, and automation, including the rental of a computer (Tr. 1398). Such an amount does not seem exorbitant for a bank that earned $567,000 before taxes in 1963 (Tr. 1398), and was acquired by a group with considerable financial resources of its own.

Stated otherwise, we question whether a bank can be deemed to be floundering or stagnating within the sense of the Act, so as to justify an anticompetitive merger, where the bank's problems can evidently be resolved simply by an infusion of new management or a limited amount of new capital. Problems so transitory and easily resolved were not, we submit,

within the contemplation of Congress in allowing an exception to its general proscription of bank mergers that have substantial anticompetitive effects.

In addition, there is every reason to believe that the Weaver group, if determined upon the merger route, might have arranged a sale with less serious competitive consequences. Immediately after the Weaver group bought Nashville Bank, Commerce Union—a Nashville bank smaller than Third National—offered to buy it at a figure that would have provided Weaver and his associates with a profit. Moreover, the district court expressly found that there was "a marked demand for NB&T stock and important efforts to buy into the Bank during several years preceding the merger" (Fdg. 14). Weaver rejected Commerce Union's offer. He made no serious effort to find a buyer other than Third National.

With these other avenues open, so anticompetitive a merger should not, we submit, have been approved.

CONCLUSION

This appeal presents substantial unresolved issues in the construction of an important federal statute. Probable jurisdiction should be noted.

Respectfully submitted.

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APRIL 1967.

APPENDIX A

In the District Court of the United States for the Middle District of Tennessee, Nashville Division

Civil Action No. 3849

UNITED STATES OF AMERICA, PLAINTIFF

v.

THIRD NATIONAL BANK OF NASHVILLE AND NASHVILLE BANK AND TRUST COMPANY, DEFENDANTS

and

THE COMPTROLLER OF THE CURRENCY, INTERVENOR

OPINION

This action was instituted August 10, 1964 by the United States, acting through the Department of Justice, under § 4 of the Sherman Act, 15 U.S.C.A. § 4, and § 15 of the Clayton Act, 15 U.S.C.A. § 25, to enjoin the proposed merger of the Third National Bank in Nashville (Third National) and the Nashville Bank & Trust Company (Trust Company). Violations of § 1 of the Sherman Act, 15 U.S.C.A. § 1, and § 7 of the Clayton Act, 15 U.S.C.A. § 18, were charged in the complaint. Acting pursuant to the Bank Merger Act of 1960, 12 U.S.C.A. § 1828(c), the Comptroller of the Currency, notwithstanding adverse reports on the competitive factors involved from the Attorney General, the Federal Reserve Board, and the Federal Deposit Insurance Corporation, approved the merger on August 4, 1964 on the basis of a written opinion and detailed findings of fact. Plaintiff's motion for a preliminary injunc-

tion was heard August 14 and 15, 1964; it was denied August 18, 1964; and the merger was consummated the same day. Before trial on the merits and after extensive pretrial proceedings in this action, Congress enacted Public Law 89–356, 80 Stat. 7, as an amendment to § 18(c) of the Federal Deposit Insurance Act, 12 U.S.C.A. § 1828(c). The Amendment, approved February 21, 1966 and referred to as the Bank Merger Act of 1966, effected material changes in the 1960 Bank Merger Act. By § 2(c) the Amendment was made applicable to pending antitrust actions involving bank mergers consummated after June 16, 1963. The significance of that date was that the Supreme Court of the United States then rendered its opinion in *United States* v. *Philadelphia National Bank, et al.,* 374 U.S. 321, holding that the Bank Merger Act of 1960 did not, by directing the banking agencies to consider competitive factors before approving bank mergers, immunize mergers approved by them from later judicial challenge under the antitrust laws. Despite prior approval by the Comptroller of the merger of the second and third largest commercial banks in *Philadelphia,* the Court held the proposed merger to be forbidden by § 7 of the Clayton Act and such merger was accordingly enjoined. So, absent the 1966 Amendment, the Court's only task in this case would be to determine whether the merger now under scrutiny runs afoul of antitrust laws without regard to any of the banking factors enumerated in the 1960 Act. It is clear, however, that the Amendment introduces new standards to be applied by the banking agencies, by the Department of Justice, and by the courts alike. It reflects the congressional attempt to reconcile the judicial application of antitrust concepts with the standards applied by federal banking agencies in

evaluating merger applications under the 1960 Act. By § 18(c)(5)(B) of the Federal Deposit Insurance Act, as amended by the 1966 Amendment, it is provided that the responsible agency shall not approve any proposed merger transaction which shall violate the specified antitrust standards "unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." The Amendment then proceeds in the immediately following paragraph: "In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served."[1]

By § 18(c)(7)(B) it is provided that the "standards" applied by the courts in antitrust actions at-

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[1] Sec. 18(c)(5) of the Federal Deposit Insurance Act as amended by the 1966 Amendment provides:

"The responsible agency shall not approve—

"(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

"(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

tacking bank mergers "shall be identical with those that the banking agencies are directed to apply under paragraph (5)," and by § 2(c), courts are directed to "apply the substantive rule of law set forth in § 18(c)(5) of the Federal Deposit Insurance Act, as amended by this Act" in all antitrust litigation pending before them on and after the date of enactment of the 1966 Amendment with respect to all mergers consumated after June 16, 1963, the date of the Supreme Court decision in *Philadelphia.*

Thus from the terms of the Amendment as well as from its legislative history,[2] the basic congressional intent in enacting the 1966 Amendment appears to be clearly mirrored: Bank mergers must be examined and analyzed by the agencies and by the courts in terms of the antitrust standards prescribed in the Amendment, such analysis to include consideration of the enumerated special banking factors, and any violations of such standards shall constitute a barrier to bank mergers unless "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." "In every case," as the Amendment explicitly provides, there shall be taken into account "the financial and managerial resources and future prospects of the existing and proposed institutions and the convenience and needs of the community to be served." The banking industry is thus recognized as occupying a unique place in our national economy requiring a specialized set of antitrust standards, and under prescribed conditions exemption from the operation of antitrust consequences altogether with the exception of those prescribed in § 18(c)(5)(A).

[2] H.R. Rep. 1221, 89th Cong. 2d Sess. (1966), Bank Merger Act Amendment.

Before adverting to the merits of this case, it becomes necessary to resolve a problem of procedure. This problem arises because the Comptroller formally approved the merger prior to the 1966 Amendment and in the light of the factors of the Bank Merger Act of 1960. While the 1960 Act required him to consider anticompetitive effects, it did not require him to accord this factor any particular weight or to determine antitrust issues per se.[3]

In *United States* v. *Crocker-Anglo National Bank, et al.,* C.A. 41,808, United States District Court, Northern District of California, 35 L.W. 2209, a three-judge court rendered its opinion on October 6, 1966 in one of the three post Philadelphia cases pending at the date of the enactment of the 1966 Amendment in which mergers had been consummated after the *Philadelphia* decision. The other two pending cases were the present case and a case pending in St. Louis. Although mergers consummated before the *Philadelphia* decision were exempted from Sherman § 1 and Clayton § 7, the new antitrust standards of the 1966 Amendment were made to apply to all mergers consummated after that decision, including those chal-

[3] The 1960 Bank Merger Act applied to all banks insured by the Federal Deposit Insurance Corporation and banking agencies in considering merger applications were required to evaluate:

(1) The Financial history and condition of each of the banks involved; (2) the adequacy of its capital structure; (3) its future earnings prospects; (4) the general character of its management; (5) the convenience and needs of the community to be served; (6) and whether or not its corporate powers are consistent with the purposes of this chapter * * * the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly) and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. (12 U.S.C.A., § 1828(c) (1964)).

lenged in the three pending cases, as we have seen. In *Crocker-Anglo*, as in this case, the Comptroller of the Currency had approved the merger prior to the 1966 Amendment by applying the different criteria of the 1960 Bank Merger Act. He had not assessed its validity under the standards of the 1966 Amendment. The California Court, pointing out that under § 18(c)(7)(A) courts are directed to "review de novo the issues presented" in actions under the 1966 Amendment, stated:

> No difficulty would be presented here so far as reviewing *de novo* the first of these determinations for this court has traditionally adjudged whether mergers have anticompetitive effects. But the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community, is plainly and unquestionably a legislative or administrative determination of a type which this court, as a constitutional court, is prohibited from deciding.

Entertaining this view the Court construed the 1966 Amendment as limiting the Courts' role in pending cases as well as in all future cases to a review of the findings made by the Comptroller pursuant to the 1966 criteria. As there were no such findings by the Comptroller before the court in *Crocker-Anglo*, it was directed that the action be remanded to the Comptroller to update his findings and conclusions under and in the light of the new standards of the 1966 Amendment. It was intimated in the opinion that the court's power to review such findings as to anticompetitive effects would be somewhat broader in scope than its power to review the Comptroller's findings that anticompetitive effects are "clearly outweighed in the public interest," or as to what con-

stitute the "conveniences and needs of the community to be served." As to the latter, the courts would be restricted to a "determination of questions of law and ascertainment of whether findings of fact by the agency are supported by substantial evidence," taking into account not only the evidence before the Comptroller but also any additional evidence made a part of the record at the trial. The *Crocker-Anglo* interpretation of the 1966 Amendment as to the scope of the judicial function in the three cases pending at the time of its enactment is supported by a carefully reasoned opinion, although it must be conceded that the issue of statutory interpretation is not free from difficulty. In any event it is not deemed necessary in this action to follow the example of the California Court in remanding the action to the Comptroller for findings specifically formulated under the new criteria of the 1966 Amendment. In *Crocker-Anglo* the trial occurred before the effective date of the 1966 Amendment, and that court accordingly did not have before it any findings by the Comptroller assessing the merger on the basis of the newly enacted standards. Under such circumstances, it was the court's view that a remand to the Comptroller for updating his findings and conclusions was the proper and expedient course to follow. In contrast, the present action was tried after the 1966 Amendment and the Comptroller's assessment of the present merger under the new criteria and standards of the Amendment has been presented to the Court in various ways. First, having intervened as a party to the action under the provisions of the 1966 Amendment allowing such intervention as of right, (§ 18(c)(7)(D) of the Federal Deposit Insurance Act, as amended), he has filed a formal answer setting forth his views that the merger is not substantially anticompetitive when

evaluated under the terms of the 1966 Amendment, and that any anticompetitive effects are clearly outweighed in the public interest by the convenience and needs of the community to be served. The same views and opinions have been presented to the Court by the Comptroller, acting through his attorney, at various stages during the trial, including the making of oral arguments, the filing of written briefs, and the filing of suggested findings of fact and conclusions of law to be approved by the Court. Of greater significance, however, is the fact that the Comptroller appeared as a witness at the trial and expressed the same views and opinions in response to numerous questions on direct and cross examination. His testimony convincingly demonstrated that he was entirely familiar not only with the new standards of the 1966 Amendment, but also with the essential and material facts which had been developed at the trial. Like testimony was given by the Regional Comptroller of the Currency. There is no reason to conclude that these steps were not taken by the Comptroller in good faith. Nor are the Comptroller's opinions expressed as a witness under oath entitled to any less weight because he saw fit to intervene as a party in the action. If he concluded that the merger met the tests of the 1966 Amendment, as he obviously did, it was his right, if indeed it was not his duty, to intervene in the action to support that conclusion and to make his views, opinions and findings known to the Court.

The trial was a protracted one, extending over approximately six weeks and involving some 3,800 pages of transcript. A remand to the Comptroller could only serve the purpose of further delay. It is idle to suppose that any further significant evidence could be unearthed, or that the Comptroller would be likely to come to any different conclusion, or that he could

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have any better grasp of the controlling facts than he possessed at the trial. Since the purposes of a remand have been substantially accomplished in the manner indicated, and since the Comptroller's findings and opinions are before the Court under both the 1960 Bank Merger Act and the 1966 Amendment, the Court concludes that the remand procedure is not required.

What, then, is the scope of judicial review? Applying the rationale of the *Crocker-Anglo* opinion, the Court's review of anticompetitive effects should be broader than "public interest" and "convenience and needs." The banking agency's finding on the first issue should be accorded some weight in view of its expertise and the technical and complex nature of the banking industry, but since a violation of antitrust standards is primarily a legal issue which courts have traditionally considered they should make an independent determination with respect to it. On the other hand, since the question whether anticompetitive effects are outweighed in the public interest by the convenience and needs of the community is, in the language of the *Crocker-Anglo* opinion, "plainly and unquestionably a legislative or administrative determination * * *," the Comptroller's findings should not be disturbed unless they are unsupported by substantial evidence. This view finds strong support in the statement of the Supreme Court in *Philadelphia,* at p. 371:

> We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence * * *.

In seeking to void the merger under investigation the plaintiff relies upon Section 1 of the Sherman Act as construed in *United States* v. *First National Bank of Lexington,* 376 U.S. 665 (1964), and upon Section 7 of the Clayton Act as construed in *United States* v. *Philadelphia National Bank, supra.* As in *Lexington* and *Philadelphia,* the plaintiff's case rests primarily upon inferences derived from statistics and upon the rules of prima facie invalidity enunciated in those cases. It is argued that the merging banks were "major competitive factors" in the relevant Davidson County market, that the merger resulted in the elimination of competition between them, and, consequently, that the case falls squarely within the ambit of the Supreme Court ruling in *Lexington* under Section 1 of the Sherman Act. A fortiori, it is argued that the merger is forbidden under the less stringent provisions of Clayton Section 7. It is further insisted, independently of the Sherman Act, that the merger must fall under Clayton Section 7 standards as delineated in *Philadelphia,* in that (a) the merger has produced a firm controlling an undue percentage share of the relevant market, and (b) it has resulted in a significant increase in the concentration of firms in that market. It is therefore said that the merger "is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." In this case the plaintiff says that there is no such countervailing evidence. Plaintiff also relies upon the statement in a footnote of the *Philadelphia* opinion that "if concentration is already great, the importance of preventing even slight increases in concentration * * * is correspondingly great." Plaintiff would drastically minimize the effect of the 1966 Amendment. Its position

as to the impact of the Amendment is thus succinctly stated in its trial brief.

> The 1966 Amendment did not change materially the tests of antitrust legality applicable in bank merger cases.' The Act was designed primarily (1) to require the bank supervisory agencies to give more weight than heretofore to the competitive factor in ruling on future merger applications, (2) to remove any impression that the standards of Philadelphia and those of the Bank Merger Act of 1960 differ in fact, and (3) to make it clear that, as suggested in Philadelphia, limited recognition was to be given to the special features of commercial banking in terms of consideration of the "banking factors"—primarily a failing company doctrine with "somewhat larger contours." Philadelphia National Bank, supra, 374 U.S. at 372 n. 46.

Taking notice of the suggestions in the *Philadelphia* opinion that the failing company doctrine may have somewhat larger contours in the banking area, the plaintiff would construe the banking factors enumerated in the 1966 Amendment as being concerned primarily with the question of solvency and protection of the community against a failing bank. This is true, as the plaintiff insists, not only with respect to financial and managerial resources, but also with respect to the concept of convenience and needs of the community.

The plaintiff's restrictive interpretation of the 1966 Amendment finds little support either in legislative history or in the text of the Amendment itself. On the contrary, both legislative history and the textual provisions of the Amendment strongly indicate that it was the intent of Congress to effect substantial changes in existing antitrust law relative to bank mergers as enunciated in the *Lexington* and *Philadelphia*

cases. *United States* v. *Crocker-Anglo National Bank, et al., supra.* After the decision in the *Philadelphia* case, the validity of bank mergers was made to depend in the final analysis, if challenged in the courts, upon the application of traditional antitrust standards. Except for the vague intimation that the failing company doctrine might have somewhat larger contours in bank merger cases, no consideration was to be given in an action challenging bank mergers under antitrust laws to the special banking factors contained in the 1960 Bank Merger Act. Essentially what the 1966 Amendment does is to change this ultimate test of validity from one depending strictly upon antitrust laws to a test balancing antitrust considerations with the special factors recognized by Congress as peculiarly applicable to the banking industry. The House Report on the 1966 Bank Merger Amendment clearly sustains this view. Under the heading, "What the Bill Would Do," it is stated that it would establish a single set of standards for the consideration of future mergers by the responsible banking supervisory agencies, the Department of Justice, and the courts under the antitrust laws—standards stricter than those in the Bank Merger Act "but which include both the effect on competition and the convenience and needs of the community to be served," a standard clearly different from that of the *Lexington* and *Philadelphia* cases.

It is pointed out under the heading, "The Need for the Legislation," that the committee had heard the contention made that banking is such a unique industry and that the determination of where the public interest lies in a given bank merger situation requires such special expertise that any bank merger which has been approved by the appropriate federal supervisory agency should be absolutely immune from anti-

trust attack. On the other hand, the committee had heard the contention advanced with equal vigor that any bank merger whose effect would be to lessen competition should on that ground alone be absolutely prohibited, and that neither agencies nor courts should be permitted to examine the question of whether the overall effect of such merger might be in the public interest.

Under the heading "Purpose of the Bill," the floundering bank problem is discussed as follows:

> Under general antitrust law criteria, particularly as they have been developed over the past few years, the banking agencies find it difficult to deal as they would like with the floundering bank problem in medium to smaller sized communities. The problem arises where there is a relatively small number of banks, and one or more of these banks appear to be stagnating. It may be because it is below the economic minimum size to attract capable and vigorous management personnel, it may be because it is closely held by owners who insist on unrealistically conservative policies, or it may be for any other reasons which are discernible only by an examination of that particular bank as an individual institution. The banking agencies, with some differences in degree among themselves, have contended that they should be able to consider a merger application on the basis of such an individual examination, and to approve it if they believe that the result would be a more vigorously competing institution, furnishing better overall service to the community, even though the reduction in the number of competing units, or the concentration in the share of the market in one or more lines of commerce, might result under general antitrust law criteria in a substantial lessening of competition.

As to the intended legal effect of the Bill, the House Report proceeds:

> First, it is intended to make clear that no merger which would violate the antimonopoly section (sec. 2) of the Sherman Anti-Trust Act may be approved under any circumstances.
>
> Second, the bill acknowledges that the general principle of the antitrust laws—that substantially anticompetitive mergers are prohibited—applies to banks, but permits an exception in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served—recognizing that effects outside the section of the country involved may be relevant to the capacity of the institution to meet the convenience and needs of the community to be served—that it would be in the public interest to permit it.
>
> Third, the bill provides that this rule of law is to be applied uniformly, in judicial proceedings as well as by the administrative agencies.

Turning to the text of the 1966 Amendment, it becomes even clearer that bank mergers are sui generis, to be assessed as to anticompetitive effects not alone on the basis of the quantitative analyses of the *Lexington* and *Philadelphia* cases, but, in addition, by taking into account all material factors with respect to each institution in the setting of the relevant market, and by evaluating the special banking factors delineated in § 18(c)(5)(B). By that section, as we have seen, not only may anticompetitive effects be outweighed by the convenience and needs of the community to be served, but responsible agencies and

courts alike are mandated to take into consideration "in every case" the following special factors:

(1) Financial resources of the existing and proposed institution;
(2) Their managerial resources;
(3) Their future prospects; and
(4) The convenience and needs of the community to be served.

There is nothing in the language of this section to indicate that the special banking factors were to be given limited recognition only, or that they were to be concerned primarily with the question of solvency. It is clear that the factors embrace the problem of the failing bank as well as that of the "floundering" or "stagnating" bank. Certainly possible insolvency is an important consideration, but it may be of equal importance to the economy to eliminate a bank which has reached a point of deterioration or stagnation and to permit its merger with a "more vigorously competing" institution. Are the cases of floundering banks the "somewhat larger contours of the failing company doctrine" to which plaintiff refers? The answer from legislative history justifies an affirmative answer.

Nor does the language of Section 18(c)(5)(B) support the thesis that agencies and courts in considering anticompetitive effects in bank merger cases are to be hamstrung by cold statistics and are not to be allowed to look to the total facts in context to determine whether the statistics reflect the true competitive situation.

Mr. Justice Harlan, dissenting in the *Lexington* case, expressed the view that Congress in the Bank Merger Act of 1960 had plainly indicated that it did not intend that mergers in the banking field should be measured solely by the antitrust considerations which are applied in other industries. He further

stated that adherence to the principles enunciated in *United States* v. *Columbia Steel Co.,* 334 U.S. 495,[4] "would leave room for an accommodation within the framework of the antitrust laws of the special features of banking recognized by Congress." Because of the ruling in *Philadelphia,* this accommodation was not effectively accomplished by the 1960 Bank Merger Act, but the Court is persuaded that the accommodation to which Mr. Justice Harlan referred is the fundamental purpose and effect of the 1966 Amendment in providing that anticompetitive effects may be outweighed in the public interest by the convenience and needs of the community, and that consideration shall be given in every case to the qualitative banking factors specifically enumerated. These factors are sufficiently comprehensive in character not only to embrace the *Columbia Steel* criteria, but also to require an even broader scope of inquiry and analysis with respect to antitrust issues.

The Court's construction of the 1966 Amendment is supported by the Amendment's provision that bank mergers shall be considered in the first instance by the responsible banking agency, applying the stand-

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[4] These principles were stated in the Columbia Steel opinion as follows:

"In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed." At page 527.

ards of Section 18(c)(5), by the requirement that courts shall apply identical standards, and by the provision that the Courts' role shall be limited to reviewing de novo the issues presented under the 1966 Amendment. If it was the purpose of the Amendment simply to perpetuate without modification the *Lexington* and *Philadelphia* antitrust criteria in the banking field, it is not apparent why Congress would have emphasized by these provisions the importance of the responsible agencies' expertise with respect to bank mergers. The structuring of the Act in this respect cannot be reconciled with the logic of the *Philadelphia* decision that courts must determine the validity of bank mergers on the basis of antitrust considerations alone—primarily derived from statistics—independently of and without regard to the special features of banking recognized by Congress. Whereas under the *Philadelphia* rationale, courts determined anticompetitive effects without regard to banking factors and banking agencies determined both, a balanced consideration of anticompetitive effects and banking factors is now enjoined upon both agencies and courts, the agencies speaking first and the courts reviewing "de novo" the issues presented.

Entertaining these views as to the thrust of the 1966 Amendment, the Court is of the opinion that while the plaintiff has established an arguable case for condemnation of the merger under the pre-1966 standards of the *Lexington, Philadelphia* and other cases, treating Davidson County as the relevant geographic market and commercial banking as the services or products market,[5] the merger is not violation of the new antitrust standards of the 1966 Amendment.

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[5] The Court rejects the defendants' and intervenor's argument that in assessing the anticompetitive effects of the merger the

The term "arguable case" is used for the reason that there are at least some conspicuous points of difference between the case at bar and *Lexington* and *Philadelphia,* whether or not such differences are of controlling significance. In the *Lexington* case, the Supreme Court held invalid under Section 1 of the Sherman Act the consolidation of the first and fourth largest commercial banks in Fayette County, Kentucky. Before the consolidation the largest bank, First National, had approximately 40% of the assets, deposits and loans in the relevant market which was determined to be Fayette County. The fourth largest bank, Security Trust, before the consolidation had approximately 12% of the assets, deposits and loans. After the consolidation, the new bank, First Security, had approximately 52% of the assets, deposits and loans. The bank established by the consolidation was

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relevant geographic market is the broad area served by Third National's correspondent banking system. There is no significant legislative history to support the view that the 1966 Amendment was intended to change the relevant geographic market concept as developed in antitrust law. The Court is of the opinion under the facts of this case that the relevant geographic market is Davidson County. This is "where, within the area of competitive overlap, the effect of the merger on competition will be 'direct and immediate." *United States* v. *Philadelphia National Bank*, *supra*, at p. 357. Also, on the clear preponderance of the evidence in this case the appropriate "line of commerce" by which to appraise the competitive effects of the merger is the cluster of products and services denoted by the term commercial banking. The Court does not agree that the omission of the words "in any line of commerce" from the 1966 Amendment is indicative of a congressional intent to reject "commercial banking" as a distinct line of commerce in appraising anticompetitive effects. It cannot be presumed that such an important change in established antitrust law would be made by mere omission. Again, there is really no significant legislative history to support the defendants' and intervenors' position on this point.

larger than all of the remaining banks combined. In addition to these statistics reflecting "bigness," the Court relied upon the testimony from three of the four remaining banks that the consolidation would "seriously affect their ability to compete effectively over the years." It was concluded that the two banks before the consolidation were major competitors and that the elimination of significant competition between them constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. The statistics of the present case, of course, are not as impressive as those in *Lexington*. Third National, having approximately 33% of assets, deposits and loans before the merger, possessed approximately 38% in these categories after the merger. It was second in size before the merger and it retained the same position in the Davidson County market after the merger. The Trust Company's share of assets, deposits and loans before the merger was only approximately 5% as compared with the 12% of the smaller bank in *Lexington*. There is no comparable testimony in the present case from any of the remaining banks in Davidson County that the consolidation will seriously affect their ability to compete effectively. In *Philadelphia* a 30% market share resulting from the merger was regarded as undue, as compared with approximately a 38% market share in the present case; but in *Philadelphia* the merger resulted in a 33% increase in concentration between the two largest banks; whereas the increase in the present case between the three largest banks is approximately 5%. The *Philadelphia* merger formed a bank which became the largest in the market area; whereas, in this case, as pointed out, the new banking institution will continue to occupy second place. In *Philadelphia* neither of the banks involved had antitrust clean hands—the Phila-

delphia National having acquired nine formerly independent banks and Girard having acquired six, such acquisitions having extended over a long period of time into the recent past. In the case at bar, there is no significant merger history either with respect to the two banks or in the Davidson County commercial banking market.

Other differences could be pointed out, but it is clear to the Court that whatever the result in this case may have been before, the merger now under consideration does not run afoul of antitrust standards when evaluated in the terms of the 1966 Amendment, as the Court construes it.

The Trust Company was chartered in 1889. Its name was changed in 1956 to Nashville Bank & Trust Company. It opened its only branch in 1959. Prior to the change of ownership in 1964, the controlling interest in the Trust Company had been owned by H. G. Hill, Jr. and his retail grocery chain operating in the Middle Tennessee area. The institution had been operated primarily as a trust company [6] with commercial banking occupying a place of secondary importance. In 1956 it brought in a former railroad executive, W. S. Hackworth, as president and began to emphasize the commercial aspects of its operation. Dur-

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[6] The Trust Company had created and maintained what was for the most part a good trust department, an aspect of its operations which need not be discussed in detail herein. Trust departments, as the evidence shows, are operated primarily as a service to bank customers and are not an important lever in obtaining commercial business. While there is some direct competition for trust business in the market area between commercial banks having trust departments, such competition is minimal. The greatest area of direct competition for trust business is not with other banks but with individuals, such as lawyers. The loss of a trust account to a competitor bank is of infrequent occurrence.

ing the period from 1955 to 1964 its assets, deposits and loans more than doubled, and its earnings record was good. This rate of growth, however, leveled off about the year 1960. From that time until the merger with Third National its rate of growth was markedly less than that of any of the other banks in Davidson County. For the period 1956-60 its rate of growth in total assets was 46.55%, a figure which dropped to 20.32% for the period 1960–64. For the same periods the drop in deposits was from 50.58% to 18.77%, and the drop in total loans and discounts was from a percentage gain of 77.57% to 29.86%. Its percentage of total banking business in the market declined from 5.72% on June 30, 1960 to 4.83% on June 30, 1964.

The evidence demonstrates conclusively that the Trust Company, when considered as a commercial bank, has not been an innovator or an aggressive competitor. Its operations have been dominated by unaggressive and ultra-conservative management policies. At the time of the merger and for many years prior thereto it had a serious lack of managerial resources due primarily to the fact that its salary scale was wholly inadequate and it was without a funded pension plan for its employees. As pointed out by the Comptroller of the Currency in his decision approving the merger on August 4, 1964, "a bank is only as good as its management." At that time the 68 year old bank president was seriously ill and anxious to retire, having an illness which has since caused his death. H. G. Hill, Jr., Chairman of the Board, had sold the controlling stock interest in the Trust Company, owned by his grocery firm, the H. G. Hill Company, to William C. Weaver and associates, and resigned from the bank's board of directors. Kirby Primm, the bank's only full time business so-

licitor, had resigned and taken a position with the First American National Bank, the largest bank in the market area. All three of these men had been key factors in the growth which the bank had enjoyed during Hackworth's tenure as president, and it is no exaggeration to say that so far as the Trust Company's commercial business was concerned they were practically irreplaceable. Much of the new business was brought to the Trust Company due to the formidable influence and personal business connections of Hill and Hackworth. Primm had been exceedingly resourceful in soliciting new business, particularly in capitalizing upon firms which did business with the Hill grocery stores. The decline in the bank's rate of growth is attributable in large measure to the loss of two of these individuals, to Hackworth's declining health, and to the lack of branch banks and other necessary facilities. In addition, both Hackworth and Primm testified that the Trust Company had reached a plateau and that they had gone as far as they could in bringing in new business by soliciting their friends and business connections. Hackworth described the bank's dilemma as follows:

> The earnings of Nashville Bank and Trust Company in the immediate past have been satisfactory. However, if the Nashville Bank and Trust Company made the expenditures necessary to bring it into a position to compete successfully and substantially in the Nashville area banking industry, such as additional branch banks, increased salary scale, automation, funded pension plan, employee welfare benefits and other related modern banking methods and procedures which have come to be necessary in order to render adequate and modern service to the public, it is certain that its pattern of satisfactory earnings could not be maintained and such earnings might very well disappear.

The evidence demonstrates that the Trust Company management problem was one of serious proportions which made it practically impossible to attract and hold competent young men. It is significant that during his 17-year tenure at the Trust Company Primm's salary had increased by only 45% above a very low beginning, and that First American offered him an immediate salary increase of 60%.

The Trust Company's lack of dynamism and aggressiveness is demonstrated in many other ways. There had been no change in department heads from 1946 until the merger in 1964, a situation hardly calculated to interest young managerial leadership. Many of its officers and board members were old and the bank was in serious need of qualified young men as replacements. Although the Trust Company, due primarily to the personal business relationships of Hackworth and Hill, was able to grow substantially during the early years of Hackworth's tenure, no substantial or concerted effort was made to improve or modernize its methods, facilities, attitudes or personnel and management policies. For example, it consistently had the lowest loan to asset ratio of any bank in Davidson County, its loans being confined primarily to real estate and secured loans as distinguished from short term commercial loans. It operated without the benefit of credit files or a credit department. It employed no credit specialists. In consequence it was not able to handle indirect consumer loans or the larger, more complicated credit situations. Its loss experience, particularly in recent years, had not been good. Its emphasis was consistently upon profits rather than upon making the expenditures necessary to place itself in a posture to be truly and significantly competitive. In addition to inadequate salaries, the lack of a funded pension

plan and low fringe benefits, it failed to provide branches, the hallmark of modern banking. It had only one branch as of the date of the merger in the Davidson County market in which there were 52 branch banking offices. Nor did it provide modern equipment, modernized banking quarters, or a continuous audit program. It was not a member of the Federal Reserve system and it had no regular customer call program.

Capital City Bank, on the other hand, which had only begun operations in 1960, and being less than one-fourth the size of the Trust Company, had established three branches. The Comptroller of the Currency was of the opinion that the Trust Company could have established from eight to ten branches in Davidson County if it had so desired. He stated that its failure to branch indicated that it was not disposed to make the needed struggle indicated for growth. Its failure to have any automated or computerized equipment stands in contrast with most other banks of its approximate size in Tennessee. There were many other indicia of negative and unprogressive management policies, including its failure to remedy serious problems in the credit department despite warnings by the FDIC Examiner, its high proportion of criticized loans as reflected in FDIC reports, and its failure to hold any officer staff meetings since 1962.

Considering the Trust Company's problems, deficiencies and weaknesses, it is not difficult to understand the Weaver group's decision to merge with Third National rather than to undertake the formidable task of negotiating another sale, or the even more formidable task of solving the bank's many problems directly. The Weaver group had purchased the controlling stock in the Trust Company in the early part

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of 1964 as an investment. The members of the group had had no previous banking experience and none of them had planned to become members of the Board of Directors, or to devote their full energies and resources to rebuilding the bank. Fully realizing the extent of the bank's operational problems and difficulties only after the purchase, and realizing that the bank could not be revitalized as a competitive factor in the market without the expenditure of large sums of money, it was their conclusion that the best solution was to take the merger route.

In view of this attitude on the part of the new management, the Comptroller of the Currency correctly concluded in his decision approving the merger that "when a bank, such as the merging bank, is not disposed to compete, it is idle to speak of the elimination of competition by reason of the merger." Despite its growth record in Hackworth's early years as President, the future prospects of the bank at the time of the merger may be described as unpromising. While there is some conflict, the preponderance of the evidence is that it would have been practically impossible within any reasonable period of time to obtain adequate managerial replacements either from within the bank or from the outside, a product of the bank's failure to have adquate personnel and management policies, of its overly conservative attitudes, and of its failure to make the necessary expenditures to provide itself with the facilities, procedures and equipment required to maintain a competitive posture.

Only a brief word need be said concerning Third National and its position in the relevant market. There is no dispute in the record that it had been a strong, dynamic and aggressive bank since its organization in 1927. It was characterized by the Comptroller of the Currency in his testimony at the trial

as one of the strongest and best managed banks in the nation. Of particular significance is the fact that its steady and impressive growth between 1927 and 1964 had been entirely the result of internal expansion, having no prior history of acquisition of assets by merger or consolidation. It had, in addition to its main office, some 14 branch offices in Davidson County. It has been active in the correspondent banking field, having approximately 365 correspondent bank accounts prior to the merger, most of which are located within a radius of 250 miles. Prior to the merger in 1964, it had total deposits of $315,090,000.00 as contrasted with the largest bank, First American National, with deposits of $371,108,000.00, and Commerce Union, the third largest bank, with deposits of $202,624,000.00. At that time the Trust Company had total deposits of $45,471,000.00, occupying fourth place in the market. The fifth largest bank, which had entered the market only four years previously, Capital City, had deposits of $7,266,000.00. The other three banks in the market were the Bank of Goodlettsville with deposits of $6,369,000.00; Citizens Savings with deposits of $3,053,000.00; and Whites Creek Bank with deposits of $2,603,000.00. After the merger all the Davidson County banks continued a substantial growth. As of June 1965, Third National had total deposits of $375,063,000.00; First American National had $393,040,000.00; Commerce Union had $219,514,000.00; and Capital City had $8,954,000.00. The remaining three banks had increased their combined deposits of $12,025,000.00 before the merger to $13,590,000.00.

When the general characteristics of the Davidson County market are considered, the plaintiff's insistence that the market is unduly concentrated appears to be lacking in significance. At the time of the

merger all of the eight Davidson County banks had combined assets of slightly less than one billion dollars. In such a relatively small banking market it does not appear unreasonable that there should be a concentration of approximately 93% of combined assets in three banking institutions, this figure being approximately 97% after the merger of the Trust Company and Third National. The record contains figures for comparable southeastern markets competitive with Nashville and having three major banks holding between 90 and 100% of the loan and deposit business. For example, Chattanooga has concentration among three banks of 100%; Mobile, Alabama, 98%; Birmingham, Alabama, 93%; Jackson, Mississippi, 98%; Memphis, 91 to 92%. The three largest cities in Tennessee—Memphis, Nashville and Knoxville—are now served by only seven banks, the largest number for any Tennessee city.

A meaningful fact in this case is that the Davidson County banks have attained their present market shares and size through internal growth and not through acquisition, a fact which is in marked contrast with the situation which prevailed in the *Philadelphia* case, as already pointed out. Another distinctive characteristic of the Davidson County market is that it is highly competitive at all levels, a fact which is clearly established by the preponderant testimony of competent and knowledgeable expert witnesses and by objective evidence of low service charges. Rivalry for business has always been exceptionally keen. The ease of entry is clearly indicated by the case of Capital City Bank which entered the market in 1960 and has had a substantial and continued success. There is no evidence of oligopolistic behavior in the relevant market. On the contrary, that the Nashville banks are keenly competitive with respect to

service charges, the solicitation of business, and in making changes and innovations is the only fair and reasonable conclusion which can be drawn from the record.

If the *Columbia Steel* factors, relegated to a place of relative unimportance in the *Lexington* case, are considered to have been restored to grace with respect to bank mergers by reason of the 1966 Amendment, and the Court is convinced that they were, and if the present case is accordingly analyzed in terms of such factors, it seems clear that the plaintiff's position in this case cannot be sustained. On the present record, only the *Columbia Steel* factors dealing with size can arguably be said to favor the plaintiff's position. It may be conceded for present purposes that the *dollar volume* and *percentage of business controlled* are significant. But the *strength of the remaining competition* is clearly established in this case by the assets, deposits and loans of the seven banks in the Davidson County market remaining after the merger and by competent testimony of bank experts familiar with the market, that the remaining banks were active, vigorous and highly competitive. There is also convincing testimony that the merger has actually resulted in an intensification of competition among the Davidson County banks. Of importance in this connection, as already stated, is the fact that all banks since the merger have had substantial growth. The *motive* for the present merger was not predatory, but was based upon an evaluation of business and economic factors. A merger with Third National was determined to be the best solution to the grave problems confronting the Trust Company at the time of the merger. Without the merger these problems could not have been solved without drastic expenditures over a protracted period of time. Finally, the preponderance of the evidence

in this case with reference to the *probable development of the industry, consumer demands* and *other market characteristics,* is highly favorable to the merger. The Davidson County market has had no merger history; there is no trend toward concentration; the service area is rapidly growing with consumer demands being on the increase and the market being recognized as one of the most highly competitive in the nation; the remaining banks are well managed under vigorous and dynamic leadership; the Trust Company had reached a stagnant and deteriorating posture at the time of the merger, having critical managerial and other problems and deficiencies; the new owners were investors who were not disposed to make the sacrifices necessary to overhaul the bank so as to place it in a position to be substantially competitive with other banks; and actual or probable future of oligopolistic behavior is contradicted by the record. This analysis, notwithstanding the concentration and market share figures upon which plaintiff relies, compels the conclusion that the present merger is not a transaction "in restraint of trade" and consequently not prohibited by Section 18(c)(5)(B) of the Federal Deposit Insurance Act, as amended by the 1966 Amendment, the analogue of Section 1 of the Sherman Act.

Similar considerations lead to the conclusion that the effect of the present merger will not be "substantially to lessen competition or to tend to create a monopoly" in violation of Section 18(c)(5)(B) of the Federal Deposit Insurance Act, as amended by the 1966 Amendment, the analogue of Section 7 of the Clayton Act.

As already stated, no reliable extrapolation as to future prospects may safely be predicated upon concentration or market share figures alone. But con-

sidering the totality of facts as to the institutions involved and as to the relevant market, a conclusion that the merger may substantially lessen competition in the future is wholly unwarranted. Any other view would require the Court to close its eyes to facts which are far more convincing than any possible contrary conclusions which could be drawn from the market share or concentration statistics in this case.

The Court concludes that the Comptroller of the Currency's findings, made both before and after the passage of the 1966 Bank Merger Act, that the anticompetitive effects of the merger are minimal and that the merger is not violative of antitrust standards, is supported by the clear preponderance of the evidence in the record. As the Court is also of this view independently of the Comptroller's findings, and concludes that the merger does not violate the antitrust standards of the 1966 Amendment, it is unnecessary to inquire whether any anticompetitive effects are outweighed by the convenience and needs of the community. However, the Court is of the opinion that the preponderance of the evidence supports the Comptroller's finding that the convenience and needs of the community and the public interest will be far better served by Third National Bank with the additional assets which it acquired as a result of the merger than would be the case by maintaining the Trust Company as a separate institution. The Trust Company had simply reached a period of imminent deterioration. It was at the time of the merger a "floundering" bank, though not a failing one. It was no longer capable under its existing ownership and management, and with its existing facilities, procedures, and attitudes to serve the public on a competitive basis with other banks

in the market area. It was more attuned to the Victorian age which gave it birth than to the competitive realities of 20th Century commercial banking.

The Court will presently enter and file with the Clerk detailed findings of fact and conclusions of law to implement and supplement this opinion. Pending such filing, entry of final judgment denying the relief sought by the complaint will be withheld.

William E. Miller,
United States District Judge.

APPENDIX B

In the District Court of the United States for the Middle District of Tennessee Nashville Division

Civil Action No. 3849

UNITED STATES OF AMERICA, PLAINTIFF

v.

THIRD NATIONAL BANK IN NASHVILLE AND NASHVILLE BANK AND TRUST COMPANY, DEFENDANTS

and

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, INTERVENOR

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this action the Court filed its opinion on November 22, 1966. Pursuant to the concluding paragraph of said opinion, the following additional findings and conclusions are made and adopted to be taken and considered together with the said opinion as constituting the Court's findings of fact and conclusions of law in this action:

FINDINGS OF FACT

1. This is an action instituted by the United States of America under Section 4 of the Sherman Act, 26 Stat. 209, 15 U.S.C. 4, and under Section 15 of the Clayton Act, 38 Stat. 736, 15 U.S.C. 25, praying for injunctive relief to remedy and prevent alleged violations of Section 1 of the Sherman Act and Section 7 of the Clayton Act, both Acts as amended, developing

from a merger of Third National Bank in Nashville and Nashville Bank and Trust Company.

2. At the time of the merger and for many years prior thereto, Third National Bank and Nashville Bank and Trust were each engaged in commercial banking in interstate commerce.

3. The Court has jurisdiction of the subject matter and of the parties.

4. Third National Bank in Nashville (hereinafter sometimes referred to as "TNB"), a banking association organized under the laws of the United States, with its principal place of business at 170 Fourth Avenue North, Nashville, Tennessee, having all of its branches in Davidson County, is a commercial bank offering a comparative full line of banking services.

5. TNB was chartered as a national banking association on July 14, 1927, and opened for business on July 18, 1927, with a capital of $600,000 and a surplus of $120,000; as a result of successive increases in its capitalization, TNB had a capital of $6 million and a surplus of $14 million, as of December 20, 1963.

6. As of June 30, 1964, TNB was the second largest commercial bank in Davidson County in terms of assets and in total deposits; it ranked first in total loans. In addition to its main office in downtown Nashville, TNB operated fourteen branch offices located throughout Davidson County.

7. Third National Company is an affiliate of TNB, not a party defendant. It is a Tennessee corporation chartered in 1929. The capital stock of the corporation is owned by three trustees who are principal officers of Third National Bank. The trustees hold this stock for the benefit of the stockholders of the Third National Bank. Third National Company is engaged primarily in the business of making and servicing mortgage loans, a substantial number of which are

sold to the general public, but also a substantial number are sold to the Bank either for its own account or as investments in trust accounts managed by the Trust Department of TNB. In most cases after loans are sold either to the general public or to the bank or to the Trust Department, the Third National Company continues to service these loans. Third National Company operates a mortgage loan department, making mortgage loans on improved real estate in Nashville, Tennessee. Its holdings consist of mortgages on institutional, commercial, industrial and residential property. TNB refers a considerable number of customers to the Third National Company when they either wish to purchase or receive a mortgage loan, but a number find their way to the Third National Company without bank referral. It is estimated that 80% of the volume of loans handled by Third National Company are either for the Bank or for customers of the Bank. As of December 20, 1963, Third National Company was servicing 23 loans held by TNB having a value of $1,000,283.40; 39 loans owned by Third National Company having a value of $738,-325.76; and 318 loans held by the Trust Department of TNB having a value of $4,540,877.24, for a total of 380 loans having a value of $6,279,486.40 which were directly or indirectly held by TNB. In addition, 569 loans having a value of $378,746.20 were being serviced for investors.

8. In 1959 Third National Bank's Small Business Investment Company was chartered. Jointly owned by the Bank and the Third National Company, this affiliate, but not a party defendant, provides financial assistance to worthy small businesses. As of the date of trial, this affiliate had assisted only customers of TNB although the funds, theoretically, were available to all businesses located in the Nashville area.

This company is the only one of its kind located in the Nashville area.

9. Prior to the merger, Nashville Bank and Trust Company (hereinafter sometimes referred to as "NB&T", or "acquired bank"), a banking association organized under the laws of the State of Tennessee, with its principal place of business at 315 Union Street, Nashville, Tennessee, having a single branch in Davidson County, was the fourth largest commercial bank in that County in terms of assets.

10. NB&T was chartered as The Nashville Trust Company on July 6, 1889 and opened for business with capital of $250,000 on September 9, 1889. In 1900 a savings department was opened and a banking department which accepted checking accounts followed in 1901. NB&T had a capital of $1,633,300, a surplus of $1,700,000, and undivided profits of $1,-028,546, as of December 20, 1963.

11. On May 8, 1956, an amendment to The Nashville Trust Company's charter was issued changing the name to The Nashville Bank & Trust Company. Since the Bank was founded originally as a trust institution, commercial banking activities have been emphasized only in comparatively recent years and have been confined primarily to the immediate community served.

12. Commencing with its change of name and the election of W. S. Hackworth ("Hackworth") to its Presidency, NB&T succesfully developed public acceptance as a commercial bank. By August 1964, NB&T was a medium-size commercial bank, the second largest state bank in Tennessee, offering some but not all of the banking services customarily available at such institutions.

13. As of September 30, 1963, principal holdings of

the 16,333 outstanding common shares of NB&T among 73 stockholders were as follows:

	Shares
H. G. Hill Co	9,845
H. G. Hill, Jr	444
Mamie Wilson Hill	101
W. S. Hackworth	2,510

14. Despite a marked demand for NB&T stock and important efforts to buy into the Bank during several years preceding the merger, only a miniscule percentage of the Bank shares were available for purchase.

15. James J. Saxon, Comptroller of the Currency of the United States (hereinafter sometimes referred to as "Comptroller"), intervened as a party defendant, pursuant to the 1966 Amendment, by filling an answer in this action on March 8, 1966.

16. Products and services denoted by the terms commercial banking include the following:

a. Creation of a media of exchange—resulting from the interrelation of credit extension and demand deposits;

b. Deposit function—encompassing demand deposits, savings deposits, certificates of deposits and savings clubs;

c. Credit function—including real estate loans, commercial and industrial loans, loans for purchasing or carrying securities, loans to financial and eleemosynary institutions, loans to farmers, loans to individuals for personal expenditures (either single payment or installment);

d. Trust powers for personal and corporate trusts;

e. Safekeeping function—exemplified by escrow duties and safety deposit vaults;

f. Lines of credit—extended to important customers;

g. Collective function—exercised under drafts, bills of lading, etc.;

h. Correspondent banking facilities.

17. Commercial banks located within the Sixth Federal Reserve District may be classified according to deposits into three size categories, as follows:

a. Small banks, with deposits of less than $10 million;

b. Medium-size banks, with deposits from $10 to $50 million;

c. Large banks, with deposits over $50 million.

18. At the time NB&T merged with TNB, and for several years prior thereto, eight banks were located in Davidson County; six of these maintained their head offices in downtown Nashville.

19. The relative size and percentage participation of each of the commercial banks located in Davidson County, according to their Assets, Deposits, and Loans, on December 20, 1963, the last call date prior to public announcement of the merger, were as follows:

Bank	Assets		Deposits		Loans	
	$ Millions					
First American National	$392.9	(38.9%)	$357.5	(39.4%)	$172.1	(35.6%)
TNB	339.5	(33.7)	304.1	(33.6)	175.2	(36.2)
Commerce Union	209.5	(20.8)	185.9	(20.5)	105.1	(21.7)
NB&T	47.3	(4.7)	42.1	(4.6)	21.4	(4.4)
Capital City	7.5	(0.7)	5.8	(0.6)	3.1	(0.6)
Bank of Goodlettsville	6.2	(0.6)	5.7	(0.6)	3.9	(0.8)
Citizens Savings	3.3	(0.3)	2.9	(0.3)	1.7	(0.4)
White's Creek	2.6	(0.3)	2.4	(0.3)	1.2	(0.3)
TOTAL	$1,008.8	(100.0%)	$906.3	(100.0%)	$483.8	(100.0%)

20. Both NB&T and TNB were and remain disenabled by operation of State Statute from establishing or operating branches outside the borders of Davidson County.

21. All other commercial banks having main offices in Davidson County are likewise prohibited from establishing or operating branches outside that county with the exception of Commerce Union Bank which is permitted by State Statute to operate eight branches outside the county which it had created prior to enactment of the said legislation.

22. NB&T's head office, presently a branch of TNB, was located in the financial district of Nashville and its sole branch, now an office of TNB, was situated within the city about five miles from its center.

23. TNB's head office is located in the financial district of Nashville and all fourteen of its branches prior to the merger were located in Davidson County, within an eight-mile radius of the head office.

24. The bulk of the IPC deposits of each commercial bank located in Davidson County originate from customers having residence and/or business addresses within Davidson County.

25. Between 83% and 92% of NB&T's IPC deposits according to number of accounts, originated from customers having their residence and/or business addresses within Davidson County.

26. The bulk of TNB's IPC deposits originate with customers having their residence and/or business addresses in Davidson County.

27. NB&T's operations and activities were confined almost entirely to Davidson County and this constituted the principal area for NB&T's effective solicitation of business; consequently, its competitive activities were primarily limited to that territory. All radio and television advertising purchased by NB&T during the years 1962 and 1963 was purchased from and carried by radio and television stations located in Davidson County.

28. TNB's operations and activities have been premarily concentrated in Davidson County except with respect to correspondent banking, an activity not widely engaged in by NB&T. Hence, Davidson County constituted the area of competitive overlap wherein the effect of this merger on such competition as existed between the merged institutions will be direct and immediate. All radio and television advertising purchased by TNB during the years 1962 and 1963 was purchased from and carried by radio and television stations located in Davidson County.

29. The decision of the Comptroller which approved this merger measured banking monopolization aspects in terms of the Nashville area or community.

30. The Application measures the territory for potential growth almost entirely in terms of economic outlook for Nashville.

31. The service area for banks other than TNB and NB&T located in Davidson County has been and is primarily bounded by the territorial limits of said County, except for eight branches of Commerce Union Bank whch are located outside the County. (This finding takes no account of correspondent banking.)

32. The factor of inconvenience localizes banking competition. Individuals and local businesses typically confer the bulk of their patronage on banks in their local community, finding it impracticable to conduct their banking business at a distance.

33. Metropolitan Nashville, considered as a banking community, is relatively isolated from other financial centers, so that the innate localized nature of economical banking rivalry for customers restricts evaluation of the principal competitive effects flowing from this merger to banks located within Davidson County.

34. No concentrations of population exist in counties close enough to Davidson County capable of sup-

porting banks with deposits in excess of $25 million, and with rare exceptions banks located in proximate counties have less than $5 million on deposit. The cities nearest to Nashville having populations in excess of 50,000 persons are located substantially beyond a radius of 100 miles.

35. Defendant banks and the Comptroller failed to introduce substantial evidence or to provide any definition of a precise area of competitive overlap, other than Davidson County, wherein the effect of this merger on competition will be direct and immediate.

36. Davidson County is the relevant geographic market within which to measure the anticompetitive effects of the merger of TNB and NB&T.

37. Within the expanded area of its correspondent banking activity, excepting Davidson County, TNB's services are largely restricted to its correspondent bank customers. These services include clearing checks, placing excess loans of its correspondents, allowing its correspondents to participate in loans originated by TNB, providing investment advice, providing temporary bank management, and many other services. The major function of the correspondent relationship is to provide loan and deposit facilities to a country community greater than the banks located therein are capable of providing. TNB does not normally solicit IPC deposits, nor make loans directly to retail borrowers in the areas where its customer correspondents are located, but works through its customer correspondents which originate the loans, any excess of such loans being furnished by TNB.

38. NB&T did not provide substantial or significant correspondent banking services and was not present in TNB's correspondent banking area. The corre-

spondent accounts that it held were complimentary in nature.

39. Since NB&T did not participate in TNB's correspondent banking area, there was no competitive overlap therein.

40. Since TNB and NB&T did not compete with one another in TNB's correspondent banking area, such broader area would not be the appropriate relevant geographic market within which to measure the anticompetitive effects of the merger.

41. Considered collectively, the nature, variety, and scope of the cluster of products and services offered by commercial banks distinguish them as a "line of commerce."

42. No other type of financial institution offers the same products and services, collectively, as are provided by commercial banks, nor does any such institution offer any substantial combination of the several services provided by commercial banks.

43. Commercial banks in Davidson County perform many functions; of outstanding importance is the acceptance of deposits which includes demand, savings and time deposits. The making of commercial and individual loans, performing trust services, and providing safekeeping facilities are other primary functions. No other financial institution in Davidson County offers all of the services performed by the commercial banks.

44. Prior to the merger, both TNB and NB&T were commercial banks located in Davidson County offering commercial banking services, although the services offered by NB&T were more limited than those offered by TNB. "Commercial banking" means the aggregation of products and services in which commerical banks deal. The principal banking products are various kinds of bank credit such as unsecured

personal and business loans, mortgage loans, loans secured by securities or accounts receivable, automobile installment and consumer goods installment loans, tuition financing, bank credit cards, and revolving credit funds. Banking services include acceptance of demand deposits from individuals, corporations, governmental agencies, and other banks; acceptance of time and savings deposits; estate and trust planning and trusteeship services; lockboxes and safety deposit boxes; account reconciliation services; foreign department services (acceptance and letters of credit); correspondent service; and investment advice.

45. Demand deposits are the exclusive function of commercial banks. Ninety percent of the payments for goods, services, etc., in the United States economy each year are made by checks drawn on commercial banks. Demand deposits are essential to the functioning of the economy.

46. In Tennessee there are no mutual savings banks, industrial banks, or factors.

47. Of all other types of financial institutions which defendant banks claim to be within the same products and services market as commercial banks, all but two offer only one of the multiple services provided by commercial banks. Credit unions and savings and loan associations provide a limited combination of the deposit and loan functions. Credit union deposit and credit functions are restricted to membership.

48. Savings and loan associations in Davidson County do not accept demand deposits, exercise trust powers, provide safe deposit facilities, extend lines of credit, issue certified officer bank checks, obtain government deposits, issue bank drafts or bills of lading, issue letters of credit, perform any check collection functions, or offer customers any foreign exchange service.

49. Savings and loan associations in Davidson County are limited primarily to the making of first mortgage loans within a one-hundred mile area of Nashville, Tennessee. The major portion of the mortgage loans made by these institutions are of 25-year duration and are made on personal residences.

50. Savings and loan associations in Davidson County are solicited for accounts by the new business personnel of the Davidson County banks, and they maintain demand deposits at these banks.

51. Considered severally, certain commercial banking products and services are distinctive to the point of being entirely free of effective competition from the functions of other types of financial institutions; these include:

a. Creation of a media of exchange;
b. Demand deposits;
c. Exercise by corporations in Tennessee of trust powers;
d. Acceptance of time deposits and savings accounts from corporations and partnerships;
e. Short-term commercial credit on single or installment payments;
f. Safe deposit vaults;
g. Extension of lines of credit;
h. Correspondent banking;
i. Collections of drafts;
j. Foreign exchange;
k. Bank drafts;
l. Savings clubs (Christmas, vacation, etc.)

52. The deposit structures in commercial banks provide working capital at costs so low that such banks' products and services enjoy a cost advantage which insulate them, within a broad price range, from substitutes. When the average cost to a bank of various types of deposit services is struck and compared with

costs normally incurred by other types of financial institutions for lendable funds, the obvious advantage to commercial banks is substantial.

53. There are banking services which, although in terms of cost and price, may be competitive with services provided by other types of financial institutions, nevertheless enjoy a settled consumer preference, insulating them from competition; habit, custom, personal relationships, convenience, and doing all banking under a single roof appear to be important factors in this regard.

54. A substantial number of financial institutions such as bank mortgage companies, finance companies, insurance companies, investment banking companies and security houses are good customers of TNB.

55. Measured in terms of the overall period June 1955 to August 1964, NB&T evidenced greater rates of growth, with regard to a number of major banking functions, than any other bank in Davidson County.

56. During the period from June 1955 to June 1964, total assets of NB&T grew from $24,113,000 to $50,-863,000 for a net increase of $26,750,000 or a percentage increase of 110.9%. During the same time period Total Assets of all commercial banks located in Davidson County underwent an increase from $548.3 million to $1,053.7 million for a net increase of $505.4 million or a percentage increase of 92.2%. The increase of Total Assets for NB&T exceeded the average for all commercial banks in the County by 18.7% and exceeded the rate of growth for TNB by 5.5%. On August 18, 1964, NB&T's assets were valued at $49,108,881.

57. During the four-year period from June 1955 to June 1959, NB&T's percentage increase of Assets was 53.6%. Although the acquired bank's Asset growth during the second, equal period, i.e., from

June 1959 to June 1963 was not as rapid, Total Assets did increase from $37,044,000 to $52,583,000 for a net gain of $15.5 million or a percentage increase of 42%. In terms of absolute dollar value, NB&T acquired $2.6 million more Assets during the latter part of the ten-year period. In the second period TNB's percentage increase of Assets was 47.7%.

58. Total Deposits of NB&T during the period from June 1955 to June 1964, grew from $20,796,000 to $45,471,000 for a net increase of $24,675,000, or a percentage increase of 118.7%. During the same time period, Total Deposits of all commercial banks located in Davidson County grew from $506 million to $946 million, for a net increase of $439 million, or a percentage increase of 86.8%. The increase of Total Deposits for NB&T exceeded the average for all commercial banks in the County by 31.9% and exceeded the rate of growth for TNB by 23.8%.

59. During the four-year period, from June 1955 to June 1959, NB&T's percentage increase of Total Deposits was 59.6%. Although the acquired bank's deposit growth during the equal period, i.e., June 1959 to June 1963 was not as rapid, Total Deposits did increase from $33.2 million to $47.5 million, with a percentage increase of 43%. In terms of absolute dollar value, NB&T actually acquired $1.9 million more deposits in the latter part of the ten-year period. During the same later period, TNB's percentage increase of Total Deposits was 47.3%.

60. Demand deposits (IPC) at NB&T, during the period from June 1955 to June 1963, grew from $10,289,000 to $19,135,000 for a net increase of $8,846,000, or a percentage increase of 85.1%. During the same time period, demand deposits (IPC) of all

commercial banks located in Davidson County underwent an increase from $214,304,000 to $309,639,000 for a net increase of about $95 million, or a percentage increase of about 44.3%. The increase of demand deposits (IPC) of NB&T for said overall period exceeded the average for all commercial banks in the County by 40.8% and exceeded the rate of growth for TNB by 20.5%.

61. Total Loans and Discounts at NB&T, during the period June 1955 to June 1964, grew from $8,-096,000 to $22,792,000, for a net increase of $14,-696,000, or a percentage increase of 181.5%. During the same time period, Total Loans and Discounts of all commercial banks located in Davidson County underwent an increase from $228 million to $566 million, for a net increase of $338 million, or a percentage increase of 148.2%. The increase of Total Loans and Discounts of NB&T exceeded the average for all commercial banks in the County by 33.3%, and exceeded a rate of growth for TNB by 29.2%.

62. During the four-year period June 1955 to June 1959, NB&T's percentage increase of Loans and Discounts was 105.8%. Although the acquired bank's Loan and Discount growth during the second, equal, period, i.e., June 1959 to June 1963, was not as rapid, Total Loans and Discounts did increase from $16.6 million to $21 million, for a net gain of $4.4 million, with a percentage increase of 26.7%. This rate growth for the later four-year period was less than that of TNB by 26.8%. During NB&T's last five years loans increased substantially, achieving an all time high at the end of the period.

63. Earnings on Loans of NB&T, during the period from 1955 to 1963, increased from $394,000 in 1955

to $1,225,000 in 1963, for a net increase of $831,000, or a percentage increase of 210.9%. All commercial banks located in Davidson County had a percentage increase of Earnings on Loans, during this period, of 136.6%, while the percentage increase for TBN was 135.3%.

64. Total Current Operating Revenue for all departments at NB&T, during the period from 1955 through 1963, increased in every year from $1,219,000 in 1955 to $2,348,000 in 1963, for a net increase of $1,-129,000, or a percentage increase of 92.6%. During the same time period, Total Current Operating Revenue of all banks located in Davidson County underwent an increase from $14,606,000 to $32,431,000, for a net increase of $17,825,000, or a percentage increase of 122%. The percentage increase of NB&T's Total Current Operating Revenue during this period almost doubled but was less than percentage increase of TNB (130.1%) and the increase for all commercial banks in Davidson County. Net Operating Income Before Taxes at NB&T increased in every year from 1959 through 1963.

65. NB&T's Net Income After Taxes during the period from 1955 through 1963, grew from $99,000 in 1955 to $368,000 in 1963, for a net increase of $269,-000, or a percentage increase of 271.7%. During the same time period, Net Income After Taxes of all commercial banks in Davidson County increased from $2,060,000 in 1955 to $5,659,000 in 1963, for a net increase of $3,599,000, or a percentage increase of 174.7%.

66. As of June 30, 1964, the last call date prior to consummation of this merger, the relative size and percentage participation (according to Assets, Deposits and Loans) of each of the Banks in the County were, as follows:

Bank	Assets		Deposits		Loans	
	$ Millions					
First American National	$407.2	(38.3%)	$371.1	(38.9%)	$185.3	(35.0%)
TNB	357.1	(33.6)	315.1	(33.0)	194.4	(36.7)
Commerce Union	225.5	(21.2)	202.6	(21.2)	115.9	(21.9)
NB&T	50.9	(4.8)	45.5	(4.8)	22.8	(4.3)
Capital City	9.1	(0.9)	7.3	(0.8)	3.6	(0.7)
Bank of Goodlettsville	6.8	(0.6)	6.4	(0.7)	4.3	(0.8)
Citizens Savings	3.4	(0.3)	3.1	(0.3)	1.8	(0.3)
White's Creek	2.8	(0.3)	2.6	(0.3)	1.4	(0.3)
TOTAL	$1,062.8	(100.0%)	$953.5	(100.0%)	$529.7	(100.0%)

By October 1, 1964, the first call date after the merger, the relative sizes and participation were, as follows:

Bank	Assets		Deposits		Loans	
	$ Millions					
Third National Bank	$415.9	(38.7%)	$378.9	(39.0%)	$219.7	(40.3%)
Nashville Bank & Trust	MERGED		MERGED		MERGED	
First American National	410.0	(38.2)	372.0	(38.3)	195.6	(35.9)
Commerce Union	224.5	(20.9)	200.1	(20.6)	117.9	(21.6)
Capital City	9.9	(0.9)	8.1	(0.8)	3.9	(0.7)
Bank of Goodlettsville	6.9	(0.6)	6.4	(0.7)	4.5	(0.8)
Citizens Savings	3.4	(0.3)	3.1	(0.3)	1.8	(0.3)
White's Creek	2.9	(0.3)	2.6	(0.3)	1.5	(0.3)
TOTAL	$1,073.8	(100.0%)	$971.2	(100.0%)	$545.0	(100.0%)

67. During 1965, TNB failed to maintain its paramount position with regard to Assets and Deposits. By the last call date in that year, First American had regained leadership with $462 million (38.7%) in Assets and $421 million (39.3%) in Deposits, as against $448 million (37.6%) in Assets and $397 million (37.1%) in Deposits for TNB. As to loans, TNB continued to be the leader with $253 million (38.3%), as against $249 million (37.8%) for First American. Commerce Union remained in third position under all three standards with about 22%.

68. According to the 1960 Census, Davidson County had a population of 399,743, an increase of 24.2 percent since 1950. The growth rate of the counties ad-

jacent to Davidson County during this period was 9.6 percent, and the growth rate of the states of Alabama, Kentucky, Mississippi and Tennessee was 5 percent during this same period. The Nashville Area Chamber of Commerce estimated the 1963 population of Davidson County at 423,150.

69. The economy of Davidson County is based primarily on industry, finance, commerce and agriculture. Nashville as the capital of the State of Tennessee is a major governmental center and the regional headquarters of several federal agencies. In addition, it is the headquarters of numerous educational institutions of higher learning and national religious organizations.

70. Non-farm employment totaled 144,800 in 1962, an increase of more than 55 percent since 1949. Of this total 27.8 percent was employed in manufacturing industry, 22.3 percent in trade, 15.9 percent in services and 14.5 percent in government at both the state and federal levels.

71. The future of Nashville is bright, and the future growth potential of the Nashville-Davidson County area is enhanced by numerous factors.

72. The need for capital in the Southeastern region and in the Nashville community is great. Because of capital requirements for economic development, this region must be an importer of capital for a long time, and needs larger financial institutions all the time.

73. A large number of the major corporations in the Nashville area must seek their credit elsewhere due to the lending limits of Nashville banks.

74. Shortly prior to the merger, banks in Davidson County had the following banking offices: First American National Bank had eighteen; Third National Bank had fifteen; Commerce Union Bank had twelve

(not including eight outside Davidson County); Nashville Bank and Trust Company had two; Capital City Bank had two; Citizens Savings Bank and Trust Company had one; Whites Creek Bank and Trust Company had one; and the Bank of Goodlettsville had one. Subsequent thereto and prior to May 10, 1966, First American opened three branches and Capital City Bank opened two branches.

75. The first duty of a bank is to provide adequate liquidity, and secondly, to make all sound commercial loans it can.

76. From a banking viewpoint, to make unsound loans eventually means liquidation and does not in any wise contribute to the community. It is not prudent for a commercial bank to carry a borrower beyond the bounds of reasonable safety.

77. A bank cannot lend money successfully except on the basis of informed judgment, and to assist in this judgment credit files are essential.

78. A particular bank exercises its money creation function as part of the entire banking system, acting under statutes and also under regulations of the Federal Reserve Board. This function is not performed on an individual competitive basis and cannot be viewed separately from the entire banking system.

79. On November 8, 1964, there were 290 commercial banks in Tennessee which were insured by F.D.I.C., with 227 banks having less than Ten Million Dollars in deposits, with 52 banks having deposits exceeding Ten Million Dollars and not exceeding Fifty Million Dollars, and with 11 banks having deposits exceeding Fifty Million Dollars.

80. There are 218 cities and towns in Tennessee served by banks, of which 156 have only one bank, 50 have 2 banks, 9 have 3 banks and 3, being Nashville, Knoxville and Memphis, have 7 banks each.

81. In Davidson County after the merger more than 97% of the deposits were in the three largest banks. Such concentration is not the result of prior mergers, but of healthy economic growth, and is not in and of itself a deterrent to the organization and growth of other banks.

82. Concentration figures taken alone are not a sufficient measure of competition, as all relevant facts pertaining to the institutions involved in the context of the particular market must be considered.

83. Cities in southeastern United States comparable in population and otherwise to Nashville have ratios of concentration of deposits and loans in the three largest banks similar to Nashville, as follows:

Chattanooga—100% of depoits, 100% of loans

Mobile, Alabama—98.14% of deposits, 98.67% of loans

Birmingham, Alabama—93.59% of deposits, 93.91% of loans

Memphis, Tennessee—92.26% of deposits, 91.27% of loans

Winston-Salem, North Carolina—90.08% of deposits, 89.57% of loans

84. The Nashville banking market manifests keen competition between the three largest banks and a lack of oligopolistic behavior on their part, evidence of which includes the following:

(a) The three largest banks have taken the lead in making changes and paying more interest on savings deposits.

(b) In charges for checking account service and in trust fees, the rates of the three largest banks are competitive, although they are computed by entirely different methods.

(c) The three largest banks have been innovators.

85. Service charges of banks in Nashville are among the lower ones in cities and banks examined, and

service charges of Third National Bank are lower than any of its major competitors.

86. Third National Bank is a full service bank offering a complete range of commercial bank services. Nashville Bank and Trust Company offered customers limited services and had not kept abreast with competing banks in numerous important areas.

87. As of December 31, 1965, more than sixteen months after the merger, Third National Bank continued to be second to First American National Bank, and its share of total deposits of banks in Davidson County had declined to about 37% as compared with about 38% at the time of the merger. First American's margin of deposits over Third National on April 5, 1966, was the greatest it had been since the merger.

88.(a) At the time of the merger, it did not appear its consummation would have any serious adverse effect on other banks in Davidson County.

(b) During the period between the merger and the date of the trial, banks in Davidson County, other than Third National Bank, have continued to grow and prosper. First American National Bank continued to be largest. Commerce Union Bank and Capital City Bank enjoyed their year of greatest growth (1965), and other smaller banks have grown faster than ever before.

89.(a) The marginal borrower is likely to have no more than one bank connection, if any, and is very much limited to the bank where he has his only relationship.

(b) Qualified borrowers have many loan alternatives existing after the merger, both within and outside of commercial banking.

90. At Third National Bank, the authority of a branch bank manager to make loans of particular amounts without approval from any one depends upon

100. The few correspondent accounts held by NB&T were "complimentary and inactive."

101. The Nashville market is such that the failure of a bank located in the area to engage in correspondent banking demonstrates a lack of determination to do its job. A failure to compete in this area places a bank at a distinct disadvantage.

102. NB&T's lack of correspondents placed it at a disadvantage, as banks with correspondents received advance notice of new customers coming into the area. A bank without good correspondent relationships on the outside is in a very narrow position with regard to potential deposits. It cannot develop sufficient activity in many of its banking departments to justify going into newer type services and, generally, it cannot provide either the loan services or the effective utilization of resources in the community.

103. Although not legally required to do so, a bank has the responsibility, if it has the assets and personnel, to engage in correspondent banking.

104. NB&T could have engaged in correspondent banking had it been truly competitive. A $43 million bank in Birmingham has acquired $8 million in correspondent balances, and other banks in adjoining states, with $25 million in deposits each, have actively engaged in correspondent banking.

105. A major competitor in the Nashville market would compete in Northern Alabama for correspondents.

106. TNB, though 108th in size among this country's banks, was 58th in correspondent banking. This bank has attempted to meet every legitimate loan request from its correspondents which will meet a community need and which will serve the economy of that area. As an example, one of TNB's correspondent customers recently received TNB's aid in a $950,000

construction loan, only $140,000 of which could be carried by the correspondent. Correspondent loans assisted this customer's county in the construction of roads and schools and in the operation of the county government.

107. In this same county, the correspondent system has enabled the small bank to extend a $1,000,000 line of credit to five grain elevators, thus helping to expand its agricultural trade area. A recent loan from a correspondent resulted in the construction of a new retail store which will employ 300 persons. Other cities in nearby states benefitted similarly.

108. In 1965, the first full year after the merger, TNB sold $70,000,000 of participations to correspondents. On December 31, 1963, TNB had $66 million in correspondent balances. TNB had 364 correspondents at the end of 1963 in an area bounded by the Smokies on the East, Louisville to the North, Birmingham in the South and the Mississippi River on the West.

109. Nashville Bank and Trust Company did not lend its funds to the same extent as other Nashville banks. It had the lowest ratio of loans to deposits of any bank in the city; it had an unusually high percentage of its funds tied up in government bonds; and it had an unduly high percentage tied up in real estate mortgages which are frozen assets and which do not serve the community as well as the faster turning loans.

110. Among many services for smaller banks which Third National Bank renders as their principal correspondent are computer services.

111. Among important services not offered by Nashville Bank and Trust Company and offered by large banks in Nashville were: mobile home financing, correspondent bank facilities, purchase of

121. On or about February 12, 1964, at a gathering which preceded the National Life and Accident Insurance stockholders' meeting, Mr. Sam Fleming, President of Third National Bank, mentioned to Weaver that if he were considering the sale or merger of Nashville Bank and Trust Company to bear in mind that Third National Bank was interested in discussing the matter with him. On at lease three separate occasions later that month, Fleming discussed the matter of a possible merger of Nashville Bank and Trust Company with Third National Bank. On March 4, 1964, Weaver attended a luncheon at Third National Bank at which Fleming outlined the terms of a possible merger of the two institutions. The following day at Weaver's request, Fleming addressed a formal offer to purchase the Nashville Bank and Trust Company stock held by Weaver and his associates to Weaver.

122. On March 11, 1964, Weaver and his associates consummated the January, 1964 agreement with Hill and Hackworth, and received 10,845 shares of common stock of Nashville Bank and Trust Company in exchange for bank checks in the amount of $3,795,750.00.

123. On March 12, 1964, resolutions were adopted by the boards of directors of Third National Bank and Nashville Bank and Trust Company approving the merger agreement of the same day between said banks.

124. The merger agreement provided, *inter alia*, for an exchange of 4½ shares of stock of Third National Bank for each share of stock of Nashville Bank and Trust Company.

125. On March 13, 1964, the merger was announced and it was consummated on August 18, 1964.

126. Mr. Kirby Primm left Nashville Bank and Trust Company on or about February 1, 1964, to join

First American National Bank, after which he put concerted efforts on moving accounts from the Nashville Bank and Trust Company to First American. Prior to the announcement of the contemplated merger in March, 1964, Mr. Primm took to First American National Bank savings and checking accounts aggregating $1,298,000.00, the majority of which came from Nashville Bank and Trust Company. During a sixty day period the commercial accounts which he took were comparable to the checking accounts and savings accounts.

127. During the interim between the sale of the stock by the Hill Company and the consummation of the merger, the morale of the employees of Nashville Bank and Trust was adversely affected. Raiding attempts on both customers and key employees by First American National Bank and Commerce Union Bank were concentrated at a time following the resignation of Mr. Hill and the sale by Hill Grocery Company and Hackworth of the controlling stock to new ownership. Such conditions are typical in bank mergers and often result in an attrition of as much as 20%.

128. Messrs. H. G. Hill, Chairman of the Board, and L. P. Thweatt resigned from the Board of Directors of Nashville Bank and Trust Company on March 11, 1964, immediately prior to the transfer of the H. G. Hill Company stock to purchasers William C. Weaver and associates.

129. Mr. W. S. Hackworth, President of Nashville Bank and Trust Company, was 68 years of age in 1964, in ill health and desired to retire within the next two years. Prior to the merger, his health was so impaired that he was under the care of three physicians and daily visiting one of them for treatment of an illness which has since caused his death.

130. Obtaining qualified officer personnel from the management level down is very difficult for a bank.

131. The age of its directors and officers, the loss of Kirby Primm and the impending loss of Mr. Hackworth, coupled with the fact that Messrs. H. G. Hill, Jr., Chairman, and L. P. Thweatt had resigned from the Board of Directors immediately prior to the transfer of the stock from H. G. Hill Company, presented an almost insoluble problem to the owners of Nashville Bank and Trust Company unless resort was had to a merger.

132. Messrs. H. G. Hill, Jr., W. S. Hackworth and Kirby Primm were key men of great value to Nashville Bank and Trust Company and their loss, or in one instance imminent loss, greatly impaired the ability of the bank to compete.

133.(a) The rate of growth of Nashville Bank and Trust Company during the early years of Mr. Hackworth's presidency, to-wit, 1956 to 1960, was good with respect to deposits, I.P.C. deposits, loans and income. Its rate of growth declined markedly thereafter and leveled off after 1960 so that this bank did not keep pace with the growth of the community, or of other Nashville banks, from and after 1961. From June, 1960, to June, 1964, Nashville Bank and Trust Company was the only bank in Davidson County to show an actual decline in I.P.C. deposits.

(b) I.P.C. deposits consist of checking accounts of individuals, partnerships and corporations, excluding savings or time deposits, governmental account and deposits of correspondent banks. I.P.C. deposits are considered an important yardstick by which to measure banks because they usually portray the smaller customers who deal with the bank from day to day.

134. Nashville Bank and Trust Company on or about June 30, 1960, reached a plateau on which it

remained until the date of the merger, and in this period it was a stagnant and floundering bank whose percentage of total banking business in Nashville declined from 5.72% on June 30, 1960, to 4.83% on June 30, 1964.

135. In the Nashville banking market it is not possible for a bank long to remain upon a plateau or to be stagnant, because it must either go forward or after a while start going backwards.

136. The average salary per officer of Nashville Bank and Trust Company was lower than the average salary per officer of Third National Bank, of First American National Bank, and of Commerce Union Bank in Davidson County.

137. Salaries of Nashville Bank and Trust Company were low in comparison with banks of similar size in neighboring cities.

138. The average salary per employee of Nashville Bank and Trust Company was lower than the average salary per employee of First American National Bank, Third National Bank and Commerce Union Bank, and also lower than the average salary of employees of the four small banks in Davidson County. Fringe benefits at Nashville Bank and Trust Company were also lower than at Third National Bank.

139. A bank with below average salaries and without a funded pension plan would have difficulty obtaining qualified people from outside the bank and the filling of several important vacancies in a reasonable space of time would be extremely difficult.

140. The Board of Directors of Nashville Bank and Trust Company on January 1, 1964, consisted of thirteen members, of whom four were 75 years of age or older, nine were 65 years of age or older, and eleven were 63 years of age or older.

the size of the branch, the authority ranging from a few thousand dollars to a high of $25,000.00. There is competition between branch bank managers of Third National Bank, and on occasion a branch bank manager will make a loan that another branch bank manager has turned down.

91. Third National Bank has a history of innovating services or promptly providing new services.

92. Third National Bank has a regular recruitment program by visiting local universities to seek college graduates to enter its management development program. It also visits local high schools seeking out high school graduates to become clerks.

93.(a) Third National Bank uses a continuous audit program so as to have a continuous and daily audit control of all cash, the interest income on all notes, interest income on all securities, all rental income, control of all investment assets of the bank, and continuous control of safe keeping of securities of the bank.

(b) Nashville Bank and Trust Company had very little of continuous audit program and such program is essential in a bank the size of this one. All national banks in this region with deposits of over $40,000,000 have continuous audit programs.

94.(a) Third National Bank has been very active in the field of correspondent banking, having approximately 365 correspondent bank accounts prior to the merger in August, 1964. Nashville Bank and Trust Company has functioned to a very limited extent as a correspondent bank.

(b) As of December 31, 1963, Third National Bank had 364 deposit accounts from correspondent banks aggregating sixty-six million dollars in amount, and Nashville Bank and Trust Company had 12 correspondent bank deposit accounts aggregating one million seven hundred thousand dollars in amount.

(c) Correspondent banking departments enable a bank to provide a wider and more effective range of banking services.

95. The correspondent bank balances which Nashville Bank and Trust Company obtained from smaller banks were complimentary and inactive, because to do an effective job as correspondent for smaller banks, it is necessary to be a member of the Federal Reserve System. Nashville Bank and Trust Company did not really have a correspondent bank department as such.

96. Participation loans by Third National Bank with correspondent banks increased by Three Million Dollars after the merger, and up to December 31, 1965, which was made possible as the result of more funds available for lending by reason of the merger.

97. A correspondent relationship is absolutely necessary to a small bank. The services of a correspondent are essential no matter which bank is conducting them. The larger bank provides a substantial number of services to its correspondent customer, including clearing of checks, investment advice, safekeeping services, extension of trust facilities, loan participations, handling of overlines, foreign banking services, if needed, and many others. The system enables individual communities to have access to more money than may be available within the community.

98. Without correspondent services, the smaller bank would have higher operational costs and some legitimate loan needs of the community would not be met.

99. The three larger banks in Nashville competed throughout the Central South with banks from Memphis, Birmingham, Knoxville, Chattanooga and Louisville, together with banks in New Orleans and St. Louis, for correspondents.

dealer retail paper, convenience of branches, credit files and lending know-how, special checking accounts and services of a small business investment affiliate.

112. The legal lending limit of Third National Bank as of December 20, 1963, was $2,000,000. The legal lending limit of Nashville Bank and Trust Company as of that date ranged from $654,000 to $1,090,000. In no instance has a loan of Nashville Bank and Trust Company come up to its conditional loan limit of 25%; and only in a few instances has such bank made loans which exceeded its unconditional statutory loan limit of 15%. Nashville Bank and Trust Company was not competent to handle loans of this size without relying upon another financial institution.

113. The merger increased the legal loan limit of Third National Bank by 20%, to $2,400,000 and over $40,000,000 of additional deposits were added to its resources, making available more funds to more borrowers.

114. The legal loan limit of a bank, if not adequate for particular lending purposes, may prevent that bank from being the lead bank in arranging loans. It is important for a bank to be the lead bank in arranging loans because it can set the terms rather than having them determined by banks of another region, and interest and deposits are kept in the community rather than sent elsewhere.

115.(a) Mr. W. S. Hackworth, who became President of Nashville Bank and Trust Company in February, 1956, was the former President of a railroad, an individual of great ability, with a wide public following. He attracted considerable new business to the bank because of his popularity, wide connections and aggressive inclinations.

(b) After February, 1956, the growth of Nashville Bank and Trust Company (previously called Nashville Trust Company) was chiefly due to the efforts of W. S. Hackworth and the influence of H. G. Hill, Jr., coupled with active solicitation by Kirby Primm. Mr. Hackworth came very close to being an indispensable person to Nashville Bank and Trust Company.

116. It is estimated that approximately 30% of the deposits of Nashville Bank and Trust Company were attributable, directly or indirectly, to the Hill interests.

117. In November, 1963, Mr. William C. Weaver first entered into serious discussions with Messrs. H. G. Hill, Jr. and W. S. Hackworth relative to the possible sale of the H. G. Hill Company's interest in Nashville Bank and Trust Company to Mr. Weaver.

118. Subsequently, in a letter to Hill and Hackworth dated January 11, 1964, Weaver set out the terms previously agreed to orally by which he would purchase from the H. G. Hill Company and Hackworth 10,845 shares of the capital stock of Nashville Bank and Trust Company at $350.00 per share, with a closing date no later than April 30, 1964. These terms were accepted by Hill and Hackworth with minor changes on January 14, 1964.

119. William Weaver and associates purchased the controlling stock of Nashville Bank and Trust Company as a long term investment and without any intention of becoming active in the management.

120. In early February, 1964, officials of Commerce Union Bank indicated to William Weaver that they were anxious to merge Nashville Bank and Trust Company with their bank, and conversations on the matter followed, with discussions being terminated in mid-February, 1964.

141. Of the six departmental heads at Nashville Bank and Trust Company, four were 65 years of age or older and the other two were 59 years of age.

142. An adequate replacement for Mr. Hackworth was not available at Nashville Bank and Trust Company. Its only officers, who by age, education and identity with the community might reasonably be considered to succeed Mr. Hackworth, had little or no experience in commercial banking, with experience only in trust matters.

143. Outside of its trust department, there were fifteen officers at Nashville Bank and Trust Company as of January 1, 1964. Twelve of these were above the age of forty, with an average age of slightly more than sixty years. Of three officers under the age of forty, only one (age 28) was a college graduate.

144. The source of most new trust business of banks is from their commercial customers, and the operation by a separate institution of a trust business is doubtfully practicable under modern conditions.

145. (a) The fees charged for services by the trust departments of First American National Bank, Third National Bank, Commerce Union Bank and Nashville Bank and Trust Company were not identical because they were computed on a different basis, but they were comparable and similar.

(b) Fees of its trust department are not too important for a commercial bank. For year 1963, the trust department of Third National Bank furnished the bank with 2.5% of its total income and with only 0.58% of its total net income; for 1963, the trust department of Nashville Bank and Trust Company furnished the bank with 11.5% of its total income and with 7.15% of total net income.

146. The greatest area of competition for trust business by banks is not with other banks but with indi-

viduals, such as lawyers. Banks compete with each other for trust business only to a small extent.

147. A certain amount of trust business is leaving the Nashville community for service by institutions in the North and East.

148. Out of a total of 871 appointments made in the Probate Court during the year 1963, all Nashville Banks combined provided only 69, or a total of 7.9%. The 69 appointments of Nashville banks were as follows: First American National Bank—28; Third National Bank—19; Nashville Bank and Trust Company—10; Commerce Union Bank—7; and other banks combined—5. Similar figures were revealed for 1964 and 1965.

149. In the solicitation of trust business branch banks are advantageous and their absence is a handicap.

150. There was a tendency in the Trust Department of Nashville Bank and Trust Company for young men to come in, stay a few years and leave for better jobs and better opportunities.

151. In the Trust Departments, there is no way to compare the profits of the two merging banks for 1963 because the accounting system and methods were different and departmental expenses were not on the same basis.

152. Although Nashville Bank & Trust Company's trust department was generally regarded as good, the bank was specifically criticized by FDIC examiners in each of the reports on the performance of its trust department during the years 1960, 1961, 1962 and 1963. Several trusts had been subjected to criticism for a number of years prior to 1960, although the record is not clear as to the time of their inception. The 1962 report indicates that these criticized trusts, all of which were designated as repositories for per-

petual care funds paid by cemetery lot buyers, were deficient in several respects.

153. One trust had a contingent liability because of the speculative investments which NB&T permitted to be placed in the account by the principals of the cemetery association. The 1962 report noted that little improvement had been effected in the administration of this trust primarily because of the heavy financial involvement of the particular concern the stock of which constituted one of the major assets of the trust, and which was controlled by the principal of the cemetery association. The involvement appeared to have grown worse.

154. A second trust, also a perpetual care trust, had also been criticized on earlier occasions by the examiners. NB&T management advised examiners that it had decided to require replacements of listed holdings with orthodox trust investments. This decision was not implemented, however. Subsequently, other speculative investments were knowingly permitted by NB&T. As a trustee, NB&T failed in its responsibility to make investments to provide the greatest possible yield. This account had not received any income on any scheduled [classified] speculative investments since its inception. The 1962 FDIC report noted that the vice president in charge of the trust department were remiss in improving necessary functional procedures necessary for a prudent operation. He was criticized for exercising little control over junior officers and for failing to delegate specific responsibilities. President Hackworth's knowledge of trusts was limited thus restricting him as an adviser. The management rating of 1962 was "fair."

155. The 1963 report indicated that potential losses in NB&T's trust department had substantially increased with potential losses and contingent liabilities

continuing at unwarrantedly high levels. The conditions involved in situations such as that occurring in the cemetery trusts could transcend the effect of legal liability because publicity which would accompany any reasonable claims by beneficiaries and particularly a group that had been sold burial rights with the assurance that NB&T, as trustee, was protecting their interest in the perpetual care fund would be more damaging than legal liability alone.

156. The cemetery trusts were criticized severely over several years with successive promises and programs of correction put forward by NB&T management. Despite management's expressed concern over existing conditions, the criticisms by examiners continued to be severe; this fact lends strong support to the conclusion that either the matters were taken lightly by NB&T management or were not susceptible to correction. In 1963, NB&T had no audit controls over the trust department. Such a condition was regarded as highly hazardous.

157. The examiners note that there appeared to be sufficient technical proficiency for satisfactory operation of NB&T's trust department. However, it also noted that those improvements which had been effected had been confined to simple matters rather than substance and that the changes in criticized affairs between examinations were quite disappointing. The performance and conditions existing at the time of the examination fell far short of supporting the conclusion of technical proficiency. The management rating of "fair" was continued at the time of the 1963 examination.

158. According to the laws of the State of Tennessee, 25% of the proceeds of the sale of a cemetery lot must be placed in a perpetual care fund trust; in one such trust, distinct from the two previously discussed,

the cemetery association withheld almost $70,000 of such proceeds in violation of the statute.

159. In addition to its allowing the cemetery to default in the payment of legally required funds, the trustee (NB&T) allowed the association to place four types of illegal investments in the trust. In this course the trustee acquiesced in the violation of law.

160. There were also nonconforming or illegal investments in two other perpetual care trusts held by NB&T.

161. Subsequent to the merger, the only criticized trust assets in TNB's trust department were those which it had inherited from NB&T, i.e., cemetery perpetual care trusts.

162. Since the merger, TNB has recovered all of the funds which had not been paid in on a timely basis from the sale of cemetery lots. Moreover, TNB stopped the cemetery association from violating the law by continuing the practice of placing nonconforming investments in the trust and had "gone a long way" toward cleaning up the nonconforming investments which it had inherited at the time of the merger.

163. Depositors having deposits with more than one bank usually have a main banking account, with other accounts as complimentary or secondary in different banks.

164. Such deposits as large corporations had with Nashville Bank and Trust Company were split accounts, without a lot of activity and not requiring any particular work on the part of the bank to service them.

165. The fact that there were more than one thousand common depositors between Third National Bank and Nashville Bank and Trust Company indicates a lack of competition between them, especially in view

of evidence that Third National Bank helped Nashville Bank and Trust Company obtain business.

166. Banks do not ordinarily compete with their smaller correspondent banks, and such calls as the larger banks make upon customers of the smaller bank are courtesy calls.

167. Nashville Bank and Trust Company maintained accounts in First American National Bank, Third National Bank and Commerce Union Bank, which was a deterrent to competition by these banks with the Trust Company.

168. Nashville Bank and Trust Company and Third National Bank differed substantially in that Nashville Bank and Trust Company was a local bank investing an unusually large share of its deposits in long term real estate mortgage loans and U.S. Government securities, while Third National Bank was a regional bank, servicing some 365 correspondent banks and operating strictly a commercial type bank with emphasis on faster turning commercial loans.

169. (a) Real estate loans were an insignificant part of the loans of Third National Bank and were a substantial part of the loans of Nashville Bank and Trust Company. At the end of 1963, real estate loans constituted less than 1% of the loans of Third National Bank but constituted 35% of the total loans of Nashville Bank and Trust Company.

(b) A bank emphasizing real estate loans is competing with life insurance companies, savings and loan associations or other types of mortgage institutions. As to commercial banks, these loans are frozen assets, less stimulating to the economy than short term commercial loans.

170. On the first call date after the merger, Third National Bank had a higher volume of loans than did both Third National Bank and Nashville Bank and

Trust Company added together on the last call date before the merger.

171. A bank with lower loan to asset (or deposit) ratio than other banks in the community is not exerting its best efforts to meet the credit needs of the community.

172. The ratio of total loans to total assets of Nashville Bank and Trust Company was consistently lower than that of the three largest banks in Nashville, the difference between Nashville Bank and Trust Company and Third National Bank being 40.9% as compared with 49.6%.

173.(a) Classified loans mean the substandard, doubtful and loss loans, and the ratio of classified loans to total loans is a valid measuring device.

(b) Classified commercial loans were 2.1% of total commercial loans for national banks in Tennessee of the size from Ten Million Dollars to Fifty Million Dollars at the time of the merger.

(c) In 1960 classified loans at Nashville Bank and Trust Company amounted to 3.4% of total loans. In 1961 the figure was 3.7%, in 1962 it was 7.3%, and in 1963 it was 6.8%. Nashville Bank and Trust Company had too much classified paper in the bank from the viewpoint of bank supervision, and its officers did not properly service their loans.

(d) When classified loans amount to as much as 20% of capital structure, some type of action or warning by the Examiner is indicated. Classified loans of Nashville Bank and Trust Company exceeded 20% of capital structure in both the 1962 and 1963 examinations, and there was an unfavorable trend developing with respect to classified loans as disclosed by the recent reports of bank examiner to F.D.I.C.

174. The ratio of loan losses for Nashville Bank and Trust Company was 5.6% prior to the merger,

while that of Third National Bank was 1.6%. Reserves for bad loans are based upon the bank's actual expense in net loans.

175. Nashville Bank and Trust Company had no credit department, and such department is necessary to operate a competitive commercial bank.

176. Nashville Bank and Trust Company had only one small branch and one of its greatest handicaps was lack of branch banks, which are essential to effective competition.

177.(a) Adequate branch banks are an important element in serving the convenience and needs of the community, and a bank without adequate branches is not adequately serving the community.

(b) Branch bank managers get to know local people in local neighborhoods.

178. A substantial number of the former customers of Nashville Bank and Trust Company are now using other branches of the Third National Bank.

179. Bookkeeping, accounting and auditing procedures at Nashville Bank and Trust Company were inadequate as well as obsolete.

180. The offices of Nashville Bank and Trust Company needed substantial expenditure to renovate them.

181. If Nashville Bank and Trust Company had made the expenditures which needed to be made for the proper maintenance of the bank, its apparently good earnings record in the years immediately preceding the merger would have been substantially diminished by reason of expense of increased salaries, pensions and fringe benefits, the installation of a satisfactory auditing department, the establishment of a credit department and automation or semi-automation, the renovation of banking quarters and the establishment of branch banks.

182. After Weaver and associates contracted to pur-

chase the controlling stock in Nashville Bank and Trust Company they found many problems in the bank, the seriousness of which had not been fully realized prior to the agreement to purchase. These included the management problem, the need for and difficulty of establishing branch banks, the providing of a funded pension plan and security program for officers and employees, and the complete lack of automation and of a computer.

183. Many inquiries made and information acquired by Weaver and associates regarding the problems of Nashville Bank and Trust Company, together with Mr. Weaver's discussion with Mr. Fleming, who proposed a merger of Nashville Bank and Trust Company with Third National Bank, convinced them that a merger with Third National Bank was the best solution to the problems and the best fulfillment of their responsibilities.

184. The merger was a business necessity for Nashville Bank and Trust Company because it was standing still and within a short time would begin to retrogress.

185.(a) The employees of Nashville Bank and Trust Company are better off under the management after the merger than they were under the old management.

(b) Better conditions improved the morale of the employees of Nashville Bank and Trust Company, and improved morale resulted in better service to the public.

186. The Nashville banking market has acquired a reputation as, and is, one of the most highly competitive in the nation.

187. Competition between banks in Davidson County since the merger has been extremely active and is greater than it was prior to the merger.

188. (a) Third National Bank did not acquire by the merger an undue share of the market, its prior growth having been due to natural market forces, not mergers.

(b) The market share of Nashville Bank and Trust Company in Davidson County prior to the merger was only about 5%. This increment is not sufficiently large to have a substantial effect upon competition.

189. The merger did not result in a substantial lessening of competition and no such effect is probable.

190. One effect of the merger of Third National Bank and Nashville Bank and Trust Company upon competition was to produce a healthier, more progressive competitive market from the standpoint of better management and more dynamic leadership in the banking field.

191. Nashville Bank and Trust Company was not a modern banking institution and could not adequately serve the convenience and needs of its community.

192. The merger of Nashville Bank and Trust Company with Third National Bank resulted in greatly improved commercial banking services to the customers of Nashville Bank and Trust Company.

193. Nashville Bank and Trust Company was not a meaningful or substantial competitor in the Nashville banking community, and it competed only in a limited way with respect to certain types of loans and deposits.

194. Such limited competitive influence as Nashville Bank and Trust Company was able to exert during the administration of Mr. Hackworth was substantially eliminated by the sale of the controlling stock owned by Hill Grocery Company, the resignation of Mr. Hill, the departure of Mr. Kirby Primm and the illness of Mr. Hackworth. At the time of

the merger, in its unsettled condition Nashville Bank and Trust Company and its personnel are aptly described as "sitting ducks" for other banks.

195. As shown by the decided preponderance of the evidence, the merger of Nashville Bank and Trust Company into Third National Bank clearly serves and meets the convenience and needs of Davidson County, Tennessee area, and such convenience and needs clearly outweigh in the public interest any anticompetitive effects of the merger.

196. The merger has especially served the needs and convenience of the Davidson County area in the following very important particulars:

(a) It has entirely solved the serious management and operating problems of Nashville Bank and Trust Company.

(b) The legal lending limit of the resulting bank has been substantially increased; which provides more credit for businesses and employment for people in the community and the region.

(c) Seventeen banking offices are now available to present and future customers of Nashville Bank and Trust Company where only two were available.

(d) A fully automated operation, including two computers, has been made available to customers of Nashville Bank and Trust.

(e) A correspondent banking system covering a wide area of the Central South provides customers of Nashville Bank and Trust with important contacts.

(f) Higher salaries, increased fringe benefits, better working conditions and a funded pension plan are provided for Nashville Bank and Trust personnel and their families.

(g) Special checking accounts and a wide assortment of savings plans are available to customers.

197. The merger also served the convenience and needs of the Davidson County area in these respects:

(a) The Nashville Bank and Trust building on Union Street has been remodeled and made more serviceable for the public.

(b) The Nashville Bank and Trust has received the benefits of membership in the Federal Reserve System.

(c) Greater research facilities, better expertise in trust operations and management in depth have been made available to the trust accounts handled by Nashville Bank and Trust.

(d) Larger capital, surplus, and reserve basis, plus more stable and substantial earnings give better protection to Nashville Bank and Trust depositors and serve as a base to support further expansion.

(e) A small business investment affiliate chartered under the Federal Small Business Act, the first in Tennessee, gives added assistance to the small business customers.

(f) An experienced and extensive credit department will permit more intelligent handling of loan applications and will guard against undue credit losses.

(g) An efficient auditing department will assure better internal operations and give better protection against defalcations.

198. An application, for approval to merge the two banks was filed with the Comptroller of the Currency on April 27, 1964.

199. The merger agreement received the approval of the Comptroller of the Currency on August 4, 1964. The approval was accompanied by a written opinion detailing the reasons for the approval.

200. On February 28, 1966, the Comptroller of the Currency intervened in this action as a party subject to the provisions of 12 U.S.C. 1828(c)(7)(D).

201. On June 9, 1966, the Comptroller of the Currency appeared as a witness before this Court, and on the basis of evidence introduced in the course of trial and information available to him, concluded that the anticompetitive effects of the merger were minimal and that any such effects were clearly outweighed in the public interest by the convenience and needs of the community to be served.

202. The rapid expansion of the economy in the area consisting of Tennessee, Northern Alabama and Southern Kentucky has created a need for greater accumulation of capital to service the industries and commercial establishments which have grown up in this area.

203. The Nashville area can be predicted, with some assurance, to undergo material growth with respect to both business and population in the years to come.

204. The growth of the area has created a substantial demand for capital which cannot be met by existing local or regional institutions.

205. As an example, fourteen of the 100 largest corporations in the country are located in the environs of Decatur, Alabama, which is one of the more dynamic growing areas of the Nashville market. Not one bank in the entire Sixth Federal Reserve District is large enough to meet the credit needs of any of these corporations. The Sixth Federal Reserve District includes East and Central Tennessee, Alabama, Florida, Georgia, Southern Louisiana, and Southern Mississippi.

206. This demand has resulted in the entire southeastern region, and the Nashville area specifically, becoming dependent upon imported capital, much of it

coming from the financial centers of New York and Chicago.

207. The South, generally, is a capital deficit area.

208. Larger financial institutions contribute to an area's ability to meet its capital needs.

209. The capital shortage results in an area's dependence upon extremely large banks in money market centers such as New York and Chicago.

210. The inadequate size of local or regional institutions results in an inability of said institutions to act as lead or primary sources for credits.

211. The result of the importation of capital from such centers results in a drain of earnings, through interest payments, from the capital-short areas.

212. On December 20, 1963, the last date prior to the agreement to merge TNB and NB&T for which call reports on all Davidson County banks are in evidence, the following are statistics demonstrating total deposits, IPC deposits, and loans:

[In thousands]

	Total Deposits	Demand Deposits (IPC)	Loans
First American	357,513	138,653	172,081
Third National	304,100	112,493	175,219
Commerce Union	185,871	70,694	105,098
NB&T	42,085	18,612	21,424
Capital City	5,763	1,986	3,319
Bank of Goodlettsville	5,725	2,101	6,913
Bank of White's Creek	2,378	992	....
Citizens Savings	2,[illegible]29	1,112	3,946

213. The deposits of individuals, partnerships and corporations (IPC deposits) are more accurate indicia of a bank's position, as this figure excludes state and local deposits which are highly volatile.

214. It is possible for a bank to request temporary deposits from friends in anticipation of a call for a statement of condition (call reports) issued by the Federal bank regulatory agencies. Such a practice is

known as "window dressing" and is for the purpose of making a bank's condition appear better than it is.

215. Of all Nashville (Davidson County) banks, only NB&T is known to have engaged in this practice.

216. The large proportion of the deposits and loans held by the largest three banks is the result of natural, competitive growth. TNB has never engaged in a merger, and NB&T had not been engaged in a merger for over thirty years.

217. On the dates listed the four largest banks in Nashville had the following percentages of the commercial bank assets in Davidson County:

	12/20/63	6/30/64	10/1/64	12/31/65
TNB	33.7	33.6	38.7	37.56
NB&T	4.7	4.8		
Subtotal	38.4	38.4	38.7	37.56
1st American	38.9	38.3	38.2	38.75
Commerce Union	20.8	21.2	20.9	21.56
Total:	98.1	97.9	97.8	97.87

218. The four largest banks in Nashville had the following percentages of commercial bank deposits in Davidson County:

	12/20/63	6/30/64	10/1/64	12/31/65
TNB	33.6	33.0	39.0	37.11
NB&T	4.6	4.8		
Subtotal	38.2	37.8	39.0	37.11
1st American	39.4	38.9	38.3	39.31
Commerce Union	20.5	21.2	20.6	21.50
Total	98.1	97.9	97.9	97.92

219. On the dates listed the four largest banks in Nashville had the following percentages of commercial bank loans in Davidson County:

	12/20/63	6/30/64	10/1/64	12/31/65
TNB	36.2	36.7	40.3	38.31
NB&T	4.4	4.3		
Subtotal	40.6	41.0	40.3	38.31
1st American	35.6	35.0	35.9	37.75
Commerce Union	21.7	21.9	21.6	21.79
Total	97.9	97.9	97.8	97.85

220. Prior findings demonstrate that Weaver and his associates decided to merge NB&T into TNB because of their inability or unwillingness to take an active part in the management of NB&T and that the various problems of NB&T would best be solved through a merger with Third National Bank.

221. The plaintiff introduced statistics to show that Nashville Bank and Trust Company enjoyed a greater rate of growth in the period 1955 to 1964 than did other banks in Nashville. These statistics demonstrated that assets of NB&T increased from $24 million in 1955 to $50 million in 1964; loans from $8 million in 1955 to $22.7 million in 1964; deposits from $20.7 million in 1955 to $45.4 million in 1964; IPC demand deposits from $10.2 million in 1955 to $18.9 million in 1964.

222. The statistics also demonstrate that gross earnings of NB&T increased from $1.2 million in 1955 to $2.3 million in 1963.

223. Income of NB&T after taxes increased from $99,000 in 1955 to $368,000 in 1963.

224. The Court does not accept projected earnings for 1964 propounded by the plaintiff in GX 1011 and related testimony of witness Futoran because of the insufficient data upon which such projections were based. The plaintiff's economist who introduced these projections admitted that he was unaware of whether NB&T's accounting system was on a cash or accrual basis and admitted that he had no knowledge of the

existence or nonexistence of provisions for bad debt reserves, Christmas bonuses or other non-repetitive budgetary items in making his projections. The projections of future income contained in GX 1011 cannot be given any weight in these findings.

225. The plaintiff's statistics and the testimony of its economist demonstrate that NB&T's rate of asset growth showed a decrease of 55% in the years 1960 to 1964 as compared to the years 1955 to 1960 while every other Nashville bank showed an increase.

226. The plaintiff's evidence indicates an 87% decrease in the rate of growth of loans and discounts by NB&T in the period 1960 to 1964 as compared to the period 1955 to 1960.

227. During the comparable periods, all the small banks in Nashville as well as Third National Bank and Commerce Union showed a rate of growth increase in loans and discounts.

228. NB&T, according to plaintiff's exhibits and testimony, was the only bank in Nashville that showed a decrease in its rate of growth of deposits in the period 1960 to 1964 as compared to the period 1956 to 1960.

229. Differences in the growth rates with respect to assets, deposits; loans and discounts, and IPC demand deposits of Nashville banks between the periods June, 1956 to June, 1960 and June, 1960 to June, 1964 are reflected in the following table:

	Assets	Loans	Deposits	IPC Demand Deposits
Nashville Bank & Trust	−26.23	−47.71	−31.81	*−63.17
Third National Bank	+24.57	+9.51	+21.08	−19.47
First American	+21.54	−8.79	+24.89	−2.50
Commerce Union	+8.25	+2.87	+12.94	+11.84
All other banks in Nashville	+18.11	+10.93	+21.36	+18.81

(Capital City excluded as it was not in existence in base period 1955–1960.)

*NB&T was the only Nashville bank to show a dollar decrease in this category.

230. The importance of the IPC demand deposit figure was emphasized by the plaintiff in the presentation of its statistics. IPC demand deposits exclude deposits that come from other commercial banks, correspondent banks, governmental bodies and political subdivisions; they also exclude savings and time deposits. The plaintiff used this figure in an attempt to determine the smaller customers of the bank; to eliminate areas where the large banks are competitive as in correspondent banking; and to reflect the activity by local and smaller customers and "the people that would be reached through advertising, the people that would deal day by day with the bank."

231. The government statistics and economists demonstrated that the IPC demand deposits of NB&T were $19.9 million in June, 1960; in June, 1964 they amounted to $18.9 million. At no time after June 1960 did NB&T's IPC demand deposits ever again reach the peak that they did in that year.

232. As contrasted to NB&T's decline in IPC demand deposits, the IPC demand deposits of every other Nashville bank grew during the period June, 1960 to June, 1964.

233. Despite the friendships and the Hill connections, NB&T had not kept pace with the growth of the community. Its growth leveled off after 1961 and had reached a plateau. The president had about exhausted the area from which he could obtain business.

234. The comparison of growth rates showed that NB&T was running downhill and that its "sins of omission" were beginning to tell. The rather substantial growth in the overall period was not too significant because of the very small base from which NB&T started. There was no prospect of sufficient growth in the reasonably foreseeable future to permit NB&T to automate despite the fact that lack of

modern equipment made it impossible to service the large accounts needed to enable the bank to grow.

235. The major competition in Nashville and Davidson County, among banks, was between the First American National, Third National and Commerce Union.

236. NB&T was a substantial correspondent customer of each of the three larger banks in Nashville. Its primary account was maintained at First American in amounts ranging up to $2.5 million. It is probable that NB&T was First American's best customer.

237. In return for the substantial balance carried with First American, NB&T received out-of-town check clearing services, some credit advice, investment advice, transfers and assistance with bond issues.

238. At one time, NB&T was owned by First American; since its establishment as a separate entity it had been a correspondent of First American's. The relationship between First American and NB&T was one of helpfulness. The helpfulness included assistance to NB&T in obtaining accounts.

239. It was the practice of Nashville banks to refrain from competing actively with their correspondent customers.

240. Officers of First American National testified, however, that NB&T was active in the solicitation of accounts of First American. Much of the competition was in personal and auto loans, and most came from Hill, Hackworth and Primm.

241. The competition for direct auto loans between First American and NB&T was limited by the fact that the bulk of First American's auto loans were dealer paper rather than direct loans. The total amount of direct auto loans held by NB&T at the time of the last examination prior to the merger amounted to $2,077,418.46, or less than 10.3% of its outstanding loans.

242. In speaking of "meeting" NB&T in competition, the president of First American apparently meant that his bank called on NB&T customers in order to remain friendly in the event the relationship was dissolved.

243. Commerce Union encountered direct competition with NB&T in the direct small commercial loan business and for automobiles and other products. However, Commerce Union did not meet NB&T competitively as frequently as other banks and did not compete with NB&T for sizeable loans. Moreover, Commerce Union did not solicit NB&T accounts as actively before the merger because NB&T maintained a "nice" deposit with Commerce Union.

244. Third National Bank offered no significant or substantial competition to NB&T because NB&T was a good customer of Third National's. Because of the relationship between the larger banks and their correspondent customers competition between them and NB&T was a one-way street. Most of the competition which did exist was for food accounts and these were frequently split between one of the larger banks and NB&T.

245. On occasions, Third National Bank would encourage its customers to place a complimentary balance in NB&T. It was more important to a large bank to have NB&T carry a large balance with it than it was to compete with NB&T for some small loans.

246. This lack of competition between larger bank correspondents and the smaller banks is confirmed by the president of Capital City Bank who testified that the larger banks do not tend to take accounts away from smaller ones, and that Capital City does not consider Third National, its correspondent, a direct competitor.

247. The competition which did exist from NB&T in Davidson County was neither considered major nor significant NB&T was not an innovator or a leader in the local banking market.

248. On one occasion, NB&T was given the opportunity to extend a credit of $500,000 to a large mortgage banking firm. Because of its lack of know-how, it was necessary for NB&T to seek the advice of another bank on how to handle the credit. NB&T never made any move to obtain any additional deposits or to extend any additional credit to this mortgage banker. As the mortgage banking industry is a substantial part of local financial picture, a major competitor would have had more interest in it.

249. The lack of the competitive atmosphere at NB&T was one of the causes of Kirby Primm leaving its employ. The bank had no competitive lending know-how and it lacked the aggressiveness to compete in the highly competitive market. 60% of the officers of NB&T were over 57. Generally speaking, when men approach retirement age their aggressiveness decreases.

250. The disappearance of a competitor and the disappearance of competition are two different things.

251. The state banking superintendent and the Comptroller of the Currency each appeared on the stand and testified that in their opinion the merger did not and would not result in a substantial or significant lessening of competition.

252. On at least three occasions NB&T advertised 5% direct loans on new cars. Nevertheless, it is uncontradicted at the time of the merger TNB possessed twice as many direct automobile loans as NB&T and approximately one-third of Commerce Union's automobile loans were direct. This plaintiff's witness also testified that anyone with good credit could obtain

these same rates on direct automobile loans at any bank in Nashville.

253. In automobile lending the three largest banks in Nashville primarily emphasized indirect loans in their advertising. On the other hand, NB&T advertised strictly for direct automobile loans, and the president of the largest bank in Nashville testified that he knew of no instance in which NB&T dealt in an indirect automobile loan, although the last FDIC examination report showed a miniscule amount of such indirect paper.

254. Indirect automobile financing offers the customer the convenience of doing business with the dealer and also permits the extension of credit to those people which might be considered poor credit risks were they to deal directly with banks. The extension of such marginal credit is considered desirable economically by the plaintiff's chief economist.

255. If a bank is dealing only in direct consumer loans (1) either it does not want to increase its volume of consumer credit substantially or (2) it does not wish to acquire the specialized management necessary to handle the more complex problems of indirect lending.

256. There is no evidence or inference in the record of this case which would indicate the NB&T had ever granted a direct automobile loan to a customer who had been refused such loan by any other bank or competing financial institution.

257. As a result of the lack of branches, NB&T was sufficiently handicapped in the quest for customers that it offered services and extended credit when it was not justified. Such practices are "not economically sound."

258. A bank with an adequate credit department is in a better position to meet a marginal loan require-

ment than a bank without it. NB&T had no credit department. One of the major difficulties in banks, and particularly smaller banks, is a failure to provide an adequate mechanism and personnel for the enforcement of loan provisions and their collection on maturity.

259. The greatest disservice a bank and its lending officers can do to a borrower is to carry them beyond the bounds of reasonable safety and get them in real trouble. NB&T did not have the depth of know-how in extending credit and in providing management and financial counselling and guidance to the borrower who needs it.

260. Unsound loans do not contribute to a community. To the contrary, the bank making such loans will ultimately fall into receivership with dire results to the community in which the bank exists. It would be contrary to any proper standard of bank management or bank regulation or supervision to sustain a position based on a supposed contribution to the community of the extension of unsound loans.

261. Unsound loans must ultimately threaten the solvency of a bank.

262. In some accounts, service charges at NB&T may have been lower than TNB. No actual account record is in evidence to demonstrate the number of instances, if any, in which NB&T's actual charges were less than TNB's. The plaintiff made no attempt to show relative costs. Larger IPC demand deposit accounts (over $1,000), presumably including business accounts, were responsible for 93% of the dollar value of TNB's demand deposits and 96% of NB&T's. The service charge differential noted by the plaintiff could have affected only 4% of NB&T's IPC demand deposits at most. The maximum amount involved, therefore, is $712,000. This would be insignificant.

263. An analysis of current checking account charges in 21 selected southern cities, many in the Central South and comparable in size to Nashville, shows the following uncontradicted facts:

Type of account	High charge city	Low charge city	Avg. customer chg. for all banks included	Nashville		TNB charge
				Rank	Charge	
Medium personal	$2.91	$0.40	$1.64	16	$1.08	None
Small personal	2.75	1.15	1.83	16	1.60	$1.40
Business	13.59	6.16	9.59	21	6.16	5.71

264. TNB's charges are below the averages for all banks and below the average of Nashville banks in all cases.

265. Nashville is a highly competitive market and provides consumer services at very realistic, reasonable, and low cost. That Nashville's service charges are among the lowest of southern cities would certainly be an indication of the degree of competition in Nashville.

266. Only one businessman was produced by plaintiff who had received a loan from NB&T after having been turned down by the three larger banks or by TNB. This customer's loan requirements are now being served by First American, despite a decline in his net worth during the period 1961–1964. At the time of his last refusal by TNB, the customer's debt was double his net worth.

267. One other businessman was turned down by First American and was granted a loan by NB&T. This customer was never turned down by Third National; to the contrary, he has had "quite a number" of loans from TNB.

268. The smaller banks in Davidson County have experienced substantial and steady growth since the merger. The presidents of Capital City and Bank of

Goodlettsville have stated that the merger has not hurt their banks; the former has had its greatest growth since the merger.

269. The presidents of two larger banks have each testified that competition in Nashville is greater than it was prior to the merger.

270. The plaintiff produced no evidence to show that a single individual has been harmed in any fashion by reason of the concentration of banking business in Nashville or by the merger.

271. The average classification rate of all national banks in Tennessee on the examination closest to August, 1964, was 1.43%. TNB's .6% was a substantially better performance; NB&T's 6.9% substantially worse. The use of ratios of classified loans to total loans is a valid device to measure the performance or condition of a bank and is constantly used by regulatory authorities.

272. TNB's higher 1961 classification rate of 4.8% to 1.8% was immediately reduced at the time of the next examination.

273. The substantial increase in classified paper in NB&T between 1960 and 1963 indicated that a declining trend had set in; one that had to be stopped or turned around.

274. Although TNB's loan volume was more than eight times greater than NB&T's, NB&T had more classified loans, by dollar value, than TNB did at the time of the November, 1963 examinations.

275. Although NB&T had a broader base for the maintenance of bad debt reserves because of very substantial past losses, its classified loans in November, 1963 were 145.4% of its reserve for bad debts; this compared with TNB's 17.2%.

276. The classified assets as a percentage of capital structure of NB&T increased from 15% in 1960 to

27% in 1963. This is an indication of timidity on the part of management at best; weakness and ineptness at the worst. This increase compares with a decrease at TNB, during the same period, from 13.7% to 4.5%.

277. NB&T was rated as "satisfactory" in the 1960 and 1961 examinations. By 1962, the condition of the bank had changed to "Fair."

278. Although Mr. Hill was responsible for much of the business of the bank, he took only a part-time and nonaggressive interest in the management of the institution; he was not receptive to expeditious action or progressive ideas.

279. The president and the junior officers of NB&T were lenient in extending credit for the purpose of securing deposits; it was evident by 1962 that the loan portfolio was not being serviced. By 1962, the volume of criticized loans had increased substantially in every classification category. In addition, delinquent paper was high and technical exceptions numerous. The trend at the time was not favorable; the rating of the bank fell from "satisfactory" to "fair."

280. By November, 1963, there was no improvement in either the leniency of officers or in the previously criticized improper servicing of NB&T's loan portfolio. The amount of criticized loans continued high. Reduction in previously criticized loans, although satisfactory, was largely offset by the addition of previously unclassified paper, further advances and newly-extended credits. The rating of the institution in 1963 remained "fair."

281. The condition of TNB throughout its reports since 1961 has been consistently noted as "good." Regulatory authorities found TNB to be an institution of highest quality in every respect. Its op-

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erations and credit department are highly efficient. It has a capable and fully implemented staff of lending officers whose reputation throughout the Eighth National Bank Region is well known. This bank has a very high capacity to serve the public need in its community and is a strong, highly regarded institution throughout the country, known for its strong leadership, management and board. It has shown a vigorous dynamism in expanding its services to meet an ever growing business need and has followed a fairly liberal lending policy in seeking to provide the capital needs of the area it serves. Of the 200 largest national banks in the country, Third National Bank is one of the strongest and best managed.

282. The respective capabilities of Third National Bank and NB&T in the commercial banking area are graphically demonstrated by the fact that, since the merger, Third National Bank sustained a loss of $121,000 on NB&T loans which had been received as a result of the merger; the remainder of $1,462,000 of NB&T classified loans received by TNB as a result of the merger are no longer classified due to their having been paid off or having been refinanced at some other institution.

283. The heart of the commercial banking business is commercial lending. Other activities, while of great importance, are all necessarily collateral to this essential function. This is the ultimate test of the effective capacity and competition of any commercial bank.

284. Prior to the merger, NB&T, because of the lack of a credit department, could not and did not engage seriously in commercial lending in the Nashville market.

285. NB&T had a higher proportion of government deposits to total deposits than Third National Bank or the average of all insured banks in Tennessee. This is an indication that fewer of NB&T's funds were utilized in business lending, consumer lending or traditional commercial banking functions.

286. Commercial lending is the reason for the existence of commercial banks. NB&T's commercial experience was somewhat limited. The head of the largest boot manufacturing company in the world, factories of which are located in five towns surrounding Davidson County, stated that he was unaware that NB&T was engaged in commercial lending until he became aware of this case. He had never been solicited by anyone from NB&T. NB&T's commercial banking department operated more as a sideline.

287. As of December 20, 1963, Third National Bank had a loan deposit ratio of 57.6% compared to NB&T's 50.9%. At the time of the November, 1963 FDIC examination, NB&T had 39.6% of its approximately $21.5 million in loans in mortgages.

288. Subsequent to the merger, the mortgage paper was sold off by TNB and the funds are being utilized in the Nashville area in commercial lending. The higher loan ratio of Third National Bank was also applicable to the deposits obtained from NB&T.

289. The combination of the application of a higher loan-deposit ratio added approximately $2.8 million to the total funds available for commercial lending in the Nashville area. The use of the funds previously frozen in mortgage paper added $8.4 million to the total funds available for commercial lending. Between the two the merger directly resulted in $11.2 million being placed under commercial lending in the economy of the Central South.

290. A region grows because of the growth of small firms within the region itself. A small firm in Nashville which wishes to grow is definitely dependent upon funds available in Nashville. A commercial bank best assists the growth of a developing area such as Nashville through commercial lending.

291. Competition among all financial institutions in Nashville is keen. Competition among these institutions by banks centers around First American, Third National and Commerce Union. The creation of a bank closer to the size of First American was expected to increase competition. Competition in Nashville between commercial banks has increased significantly since the merger.

292. In a city the size of Nashville, it is expected that there would be more aggressive competition with three or four banks than with 20 or 30. The merger has resulted in a healthier more progressive market.

293. The Regional Comptroller of the Currency testified that with the additional knowledge since the merger, his opinion was that the competitive effect of the merger would be much less than he had thought it would be before.

294. The Comptroller of the Currency testified that there would not as a result of the merger be a significant decrease in competition. On the contrary, the merger has been beneficial by providing an additional stimulus to the economy of this area and, to other institutions in Nashville without eliminating any substantial measure of competition. "The question is whether the absorbed institution was indeed an effective competitor. This is a question that could largely be answered in the negative." Such an institution (NB&T) sizewise and in terms of its emphasis in the lending of its money could not conceivably have been a competitive factor regionally.

295. The superintendent of banks of the Department of Banking, State of Tennessee, wrote two letters relating to the Third National Bank-Nashville Bank & Trust merger. DX–7 is written to Third National Bank and states:

> The competitive factor in my opinion will not be lessened by the merger. This assumption is based on the evident competition which now and will exist between existing First American National Bank, largest Nashville bank, The Commerce Union Bank, in third position, and Third National Bank, second in size, the surviving institution of the merger between themselves and Nashville Bank & Trust Company which holds a minor position in the field insofar as competition is concerned.

296. INX–8 is a letter written to the Regional Comptroller of the Currency, Memphis, Tennessee, by the superintendent of banks. This letter was written in response to a request from the Office of the Comptroller of the Currency as part of its regular procedure to determine whether a merger would be in the public interest. The letter states:

> Nashville banking has been considered competitive over the years. The First American National Bank being the largest since the early thirties. The proposed merger could, in my opinion, increase competition as the consolidation would make the Third National Bank nearer the size of the aforesaid largest bank.
>
> Facts remain that the survivor of the merging institutions will still remain in second place as to size and the elimination of a small competitor will not be too important. [Emphasis supplied.]

297. Upon receiving an application to merge, the Regional Comptroller assigns the investigation of the application to an examiner. Reports are then made

to the Comptroller by the examiner and the Regional Comptroller of the Currency. The report from the examiner in this case to the Comptroller states:

> Future growth and earnings of the commercial department is limited due largely to two factors; management and lack of branch facilities. Management is not aggressive, the senior officers are approaching retirement age and no provision has been made for succession. To effectively compete for the available banking business it is necessary to have an extensive branch system. This bank has only one branch in operation and since all areas of the county are already well served with branches, suitable locations are almost prohibitively high in price, and since bank lacks the necessary capable personnel to staff branches, it would be very difficult to enter into a profitable branch program at this late date.

The report notes that NB&T is "becoming less and less a competitive factor," and, further, that "competition between banks in Nashville has always been keen." It was the examiner's conclusion that the consolidation "would have but little effect upon competition and would not create a monopoly" and that the reduction of the number of Nashville banks by one would not lessen competition.

298. The report of the Regional Comptroller of the Currency states:

> the Nashville Bank & Trust Co. has gone to seed and has not maintained a commercial banking growth pattern proportionate to the three largest banks in Nashville.

This report discussed NB&T's lack of adequate branches or sufficient capital to engage in a branching program. The Regional Comptroller further stated:

that the competition which exists between the two applicant banks, while having some adverse effect upon the local competitive picture, is not of sufficient gravity to overthrow the favorable banking factors which are readily apparent.

299. In personal testimony, the Regional Comptroller stated that his opinion at the time of trial was that the effect upon competition was much less than he thought it would have been at the time of the merger.

300. The following findings were made by the Comptroller on August 4, 1964 in approving the merger:

(a) on competitive effect of merger:

> While the cold statistics presented by the application may indicate at first blush that some competition now exists between the applicants and that it will be eliminated by this merger, closer analysis of the complete picture dispels this hasty conclusion. A bank's competitive force in its community depends greatly upon the attitude of its management and board of directors. To assess accurately competition between two banks, an effort must be made to weigh the aggressiveness, the capability, the experience and the desire of the management of each to compete. When, as in this case, we find that the management of the merging bank is more interested in insurance than in banking, has no desire to maintain the bank's relative standing in the banking community, and has made no effort to improve its internal operating procedures nor elevate the morale of its personnel through better salaries and an improved pension plan, we cannot realistically view it as a competitive bank. When a bank, such as the merging bank, is not disposed to compete, it is idle to speak of the elimination of competition by reason of a merger.
>
> We would, indeed, be derelict in our responsibilities to protect the public interest in banking were we to impede effective management

from assuming the responsibilities of a declining and leaderless merging bank.

(b) on convenience and needs of Nashville:

Consummation of the proposed merger will improve the charter bank's ability to serve the convenience and needs of the Nashville public. It will be better able to meet the credit needs of its larger customers throughout the Nashville wholesale trade area. Automation will improve the operating efficiency for the benefit of the merging bank's customers. Increased salaries and other incentives such as the charter bank's pension plan will improve the morale of the merging bank's personnel. The more numerous banking services offered through the resulting bank's extensive branch system will better serve the needs of the merging bank's customers. Further, the assets of the merging bank will be pooled with those of the charter bank to be used more efficiently in promoting the economic well-being of the people of the Nashville community, the wholesale trade area which it serves, and the mid-South region of which it is the center.

In the light of all of the facts and circumstances here present, we are compelled to conclude that this merger application has met the statutory criteria and will promote the public interest. The application is therefore approved.

301. The following testimony in this case was given **by the Comptroller of the Currency on June 9, 1966:**

(a) on competitive effect of the merger:

(1) as to commercial banking industry in Davidson County:

No [the merger has not caused a significant decrease in competition], I do not think so, and on the contrary I believe it has been beneficial by providing an additional stimulus to the economy, and indeed to other institutions here

without eliminating any substantial measure of competition.

I asked myself the question, in considering this merger whether—and since then—whether, and in what respect any member of the public has been denied credit in any substantive sense which would otherwise be available.

Has the scope or quality of credit services been increased or decreased?

Has the public or any substantial segment of it been damaged by any showing of a reduction in the scope or quality of banking services, not merely in the credit area but in the fiduciary area, in the operating area, in the bond area, and bond services, in the area of other services offered by banks?

In examining these things by a practical test, I failed to see and would like to see, if anybody can produce it, any substantial evidence of harm to any segment of the public. On the contrary, as I pointed out earlier in response to your question, I think for the reasons given it has been on the contrary publicly beneficial, and in a competitive and banking sense as well.

(2) As to elimination of a competitor:

In my opinion, Nashville Bank and Trust Company was not a major or effective competitor in Nashville.

(3) on the denial of loans to two businessmen:

[If two businessmen were denied loans at a larger bank but were successful in obtaining them at NB&T the effect of this merger on such competition would be] none whatsoever.

(4) on the position of NB&T as a commercial bank in the Nashville market:

* * * since Nashville Bank and Trust was primarily a mortgage lender, obviously it was to that extent not directly competitive with the area of commercial lending as such. * * *

(5) on the position of NB&T as a financial institution in the Nashville area and the Central South:

Such institution size-wise and in terms of its emphasis in the lending of its money could not conceivably have been a factor regionally.

(6) on trust services:

I think it [the merger] would be highly beneficial to the public in order to enable the resulting institution to provide more effective trust services through the entire range of such services to the public.

(7) generally:

I do not so believe [that there has been a substantial lessening of competition as a result of the merger]. In fact, I believe that as a result of the acquisition of the resources of the Nashville Bank and Trust, the Third National Bank has been able to expand its loans, its loan capacity obviously, and of course with respect to its specific loans not only in terms of quantity but also in terms of the amount of such loans, the acquisition of these resources also provides a substantial additional base for loan expansion and of course an additional earnings capacity, and of course finally the additional protective base or cushion to provide and support expanded risk.

(b) on balancing:

Q. I believe, sir, it's your testimony that the convenience and needs of the community to be served as a result of this merger clearly outweigh any anticompetitive effect that the merger might have had?

A. Yes, sir, I believe this is plainly apparent in the presently outstanding loans of Third National Bank in its expanded trust and other services.

> Of course, the core of the commercial banking is commercial lending. * * * This is the * * * ultimate test of the effective capacity and competition of any commercial bank.
>
> In this respect, it must be said that this bank (TNB) has been a vigorous and dynamic servant of the public, not only to the benefit of the public, but to the benefit of the bank and its stockholders too, of course.

302. The findings and conclusions of the State Superintendent of banks, the National bank examiner, the Regional Comptroller, and Comptroller of the Currency as set forth in No's 293 through 301 above are supported by the preponderance of the evidence in this action which is clearly substantial in character, weight and value. There is no evidence or suggestion that any of such findings and conclusions were made arbitrarily, capriciously, or as the result of an abuse of discretion.

CONCLUSIONS OF LAW

1. The Court originally acquired jurisdiction under the Acts of Congress commonly known as the Sherman Act and the Clayton Act, and it now has jurisdiction under Section 18(c)(5) of the Federal Deposit Insurance Act, as amended on February 21, 1966, by an Act "To establish a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks, and for other purposes."

2. In the Act of 1966, bank mergers are recognized as *sui generis*, and not to be tested by the same standards as mergers generally.

3. Under the Act of 1966, the regulatory banking agency is not to approve a bank merger whose effect may be substantially to lessen competition, or to tend to create a monopoly, or to be in restraint of trade,

unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

4. Under the Act, the regulatory banking agency in determining anticompetitive effects, must take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

5. Under the Act, the standards applied in a judicial proceeding to review are identical with those that the banking agency is directed to apply, and these standards are the substantive rule of law applicable here.

6. The rule that where concentration is already high even slight increases should be prevented has a limited application with respect to mergers under the Bank Merger Act of 1966, which requires consideration by the regulatory agency and by the courts of the special factors enumerated in the Act. Such consideration may require approval of a bank merger notwithstanding such rule.

7. The merger of Third National Bank and Nashville Bank and Trust Company is not a combination in restraint of trade in commercial banking in the Nashville metropolitan area (Davidson County, Tennessee) in violation of the Bank Merger Act of 1966.

8. There is no reasonable probability that the merger of Third National Bank and Nashville Bank and Trust Company may substantially lessen competition or tend to create a monopoly in commercial banking in the Nashville metropolitan area (Davidson County, Tennessee) in violation of the Bank Merger Act of 1966.

9. Nashville Bank and Trust Company was not a substantial competitive factor in the Nashville banking market and its elimination by merger did not constitute a substantial lessening of competition within the meaning of applicable antitrust laws set forth in the Amendatory Act of 1966.

10. The merger of Third National Bank and Nashville Bank and Trust Company was procompetitive in its effect, and not anticompetitive, in that the remaining three largest banks increased their competition with each other to an extent of sufficient substance to offset the elimination of the merged bank, no remaining bank has had its ability to compete impaired, and the public interest was served.

11. The anticompetitive effects of the merger of Third National Bank and Nashville Bank and Trust Company are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the Nashville metropolitan area (Davidson County, Tennessee).

12. The preponderance of the evidence in the action (such evidence being substantial) supports the Comptroller's findings that the merger (a) is not violative of the antitrust standards of the 1966 Amendment, and (b) that any anticompetitive effects of the merger are clearly outweighed in the public interest by the convenience and needs of the community to be served.

Other conclusions of law and findings of fact are as set forth in the Court's opinion filed November 22, 1966.

WM. E. MILLER,
United States District Judge.

APPENDIX C

In the District Court of the United States for the Middle District of Tennessee, Nashville Division

Civil Action No. 3849

UNITED STATES OF AMERICA, PLAINTIFF

v.

THIRD NATIONAL BANK IN NASHVILLE AND NASHVILLE BANK AND TRUST COMPANY, DEFENDANTS

and

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, INTERVENOR

JUDGMENT

In this action pursuant to the Court's Opinion filed on November 22, 1966, and its Findings of Fact and Conclusions of Law filed on December 16, 1966, it is hereby ordered and adjudged:

That the relief sought by the complaint be, and the same is hereby, denied, and that the plaintiff's action be, and the same is hereby, dismissed.

The said Opinion and Findings of Fact and Conclusions of Law shall be taken and considered together as constituting the Court's findings of fact and conclusions of law in this action.

Each party shall bear its own costs.

WM. E. MILLER,
United States District Judge.

APPENDIX D

STATUTES INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 18(c) of the Bank Merger Act, as amended, 80 Stat. 7, 12 U.S.C. 1828(c) (1966 Supp.), provides in pertinent part:

> (5) The responsible agency shall not approve—
>
> (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
>
> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade,

unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

* * * * *

(7)(A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approvel unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

(7)(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of [Title 15], the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).

U.S. GOVERNMENT PRINTING OFFICE: 1966